89-274

No._____

FILED
AUG 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1989

GREENLEAF MOTOR EXPRESS, INC. and
ASHTABULA CHEMICAL CORPORATION,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED

1. When does an unfair labor practice accrue for purposes of the six-month limitations period of §10(b) of the National Labor Relations Act, 29 U.S.C §160(b): when a party has unequivocal notice of an alleged violation or when it knew or, through the exercise of reasonable diligence, it should have known that a violation of the Act occurred?

2. Whether the National Labor Relations Board and the Sixth Circuit acted properly in placing the entire burden of proving the statute of limitations defense on the charged party, as opposed to shifting the burden to the General Counsel to prove that the limitations period was tolled once the charged party demonstrates that the acts constituting the violation alleged, occurred outside the six-month limitations period of §10(b) of the National Labor Relations Act, 29 U.S.C. §160(b).

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the Petitioners, Greenleaf Motor Express, Inc. and Ashtabula Chemical Corp., and the Respondent National Labor Relations Board. The International Brotherhood of Teamsters, Local 337 was a party before the Board but did not participate in the Court of Appeals and is not considered a party herein.

Greenleaf Motor Express, Inc., is a corporation organized under the laws of Ohio with no affiliates or subsidiaries (other than wholly owned subsidiaries). Ashtabula Chemical Corp. is a corporation organized under the laws of Ohio with no affiliates or subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

The Petitioners Greenleaf Motor Express, Inc. and Ashtabula Chemical Corp. respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on May 18, 1989.

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals enforcing the Order of the National Labor Relations Board and the Order denying Petitioner's Motion for Rehearing and Rehearing *En Banc* are unreported and are reprinted in the Appendix hereto at pages A3 and A1, respectively.

The decision of the National Labor Relations Board is reprinted in the Appendix hereto at page A16 and is reported at 286 NLRB No. 117.

JURISDICTION

1. The Sixth Circuit Court of Appeals enforced the Order of the National Labor Relations Board and entered judgment on March 29, 1989.

2. The Sixth Circuit denied a timely application for rehearing and rehearing *en banc* and entered the appropriate judgment on May 18, 1989.

3. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) and 29 U.S.C. §160(e).

STATUTE INVOLVED

29 U.S.C. §160(b) Complaint and Notice of Hearing—Answer—Court Rules of Evidence Inapplicable.

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, that no complaint shall issue based upon any unfair labor practice occurring more than six-months prior to the filing of the charge with the Board and the service of the copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the Rules of Civil Procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., Title 28, §§723-B, 723-C) [see 28 U.S.C. §2072].

STATEMENT OF THE CASE

Greenleaf Motor Express, Inc. (hereinafter referred to as "Greenleaf") is an Ohio corporation organized in or about 1929. It is a trucking concern licensed by the Interstate Commerce Commission and the Public Utilities Commission of Ohio to transport bulk liquid chemicals in interstate and intrastate commerce. For approximately 30 to 35 years, Greenleaf has recognized Teamsters Local 377 (hereinafter referred to as the "Union") as the collective bargaining agent for its over-the-road drivers. During this time, Greenleaf and the Union have been parties to a collective bargaining relationship governed by the Teamster's National Master Freight Agreement and the Central States Area Over-The-Road Motor Freight Supplemental Agreement. The Supplemental Agreement effective at all relevant times defined the bargaining unit as including all "drivers" or "drivers-helpers" operating trucks or any other vehicles for "transportation purposes". The agreements required covered employees to join the Union within 31 days after they began their employment.

Ashtabula Chemical Corp. (hereinafter referred to as "Ashtabula"), also an Ohio corporation, was founded in 1979, and originally operated as a chemical distributor buying and selling chemicals to various industrial concerns. The thrust of Ashtabula's operations changed in 1982 when Greenleaf's drivers objected to being assigned over-the-road trips to Moundsville, West Virginia. In response, Greenleaf expanded Ashtabula's operations and hired brokers to haul loads from Moundsville. These broker-drivers did not join the Union as required by the collective bargaining agreements.[1] From the very beginning, Ashtabula and Greenleaf shared common facilities and equipment, reported to and operated out of a single location in Ashtabula, Ohio

[1] The Administrative Law Judge determined that Greenleaf and Ashtabula were always a single bargaining unit. *See* Appendix at A38, *infra*.

(Tr. 40:17-24).[2] Based upon the findings of the Administrative Law Judge (hereinafter "the ALJ") as affirmed by the National Labor Relations Board (hereinafter "the Board"), the Sixth Circuit described the highly integrated operations of Greenleaf and Ashtabula from October, 1983[3] onward as follows:

> The Company then formulated and administered a common labor policy affecting the union Greenleaf drivers and the non-Union Ashtabula drivers. All drivers worked under the same supervisor; attended combined safety meetings; and were held to the same work rules. Moreover, all drivers served the same customers. Greenleaf drivers were sometimes paired with Ashtabula drivers on a single trip in the same truck. In addition, all drivers were paid at the same rates, but amounts deducted from the Greenleaf drivers' wages for union health, welfare and pension benefits were not deducted from the Ashtabula drivers' wages. Even though the Company operated Greenleaf and Ashtabula as a single integrated business enterprise, the Company did not enforce the collective bargaining agreement by requiring the Ashtabula drivers to join the Union within 31 days of employment.
>
> Appendix at A5, *infra.*

Throughout this period of time from 1982 to October, 1983, there was nothing surreptitious about the activities of the Ashtabula drivers. Robert Wright, the Union steward since 1978, testified he became aware that Greenleaf was using non-Union drivers in 1982 (Tr. 564:6-11). In that regard, Wright testified he was not "really concerned about the non-Union drivers" at that time though (Tr. 566:23-25); (Tr. 567:1-3); (Tr. 568:3-5).

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[2] References to the transcript are designated as TR, followed by the page and line(s).

[3] As of October, 1983 the brokers utilized by Ashtabula became regular full-time employees. *See* Opinion below, Appendix at A5, *infra.*

Like Wright, Lou Candella, an employee of Greenleaf since 1975, became aware that Greenleaf and Ashtabula were using non-Union drivers in 1982 as well. Sometime after Christmas of 1982, Candella discussed the non-Union drivers with business agent, Frank Licate (Tr. 182:19-25); (Tr. 183:1-17). Candella explained that the non-Union drivers were working in Moundsville, and "pulling freight out of the Ashtabula terminal" (Tr. 184:8-10). Licate responded that he would "check into it" (Tr. 184:11-13).

As adopted by the Board, the ALJ made the following findings concerning the highly integrated nature of the operations and single bargaining unit that serve to frame the nature of those operations:

> All the drivers are under common supervision; all are disciplined by the same supervisor;—Mark Jarvis. They are sent out to work by a single dispatcher, attend the same safety meetings, are subject to the same employment policies, are all paid on the same scale, and all service the same customers of the Company using the same equipment . . . It is a single bargaining unit that was always, and is still today involved in the case.
>
> Appendix at A38, *infra*.

In the summer of 1983, Greenleaf and the Union negotiated an addendum to their collective bargaining agreement. During these negotiations the Union did not negotiate concerning Ashtabula's activities, because Licate "didn't have no problem with it." (Tr. 247:15-25); (Tr. 248:1-9). Around August or September of 1983, Licate was again informed of the non-Union drivers and again "started checking." (Tr. 254:14-25). Licate called another business agent to discuss the matter and he too said he would "check into it" (Tr. 255:1-7).

In January 1984, Greenleaf terminated the employment of driver Jerry Ashley. A few days after he was terminated, Ashley met with Licate and Union

steward Wright. At this meeting, Ashley stated that among other reasons, he was discharged for refusing to take a scheduled trip because he did not want to ride with a non-Union driver (Tr. 565:14-19). Ashley filed a grievance in this regard with the Union on January 5, 1984, which Licate received on January 18, 1984 (Tr. 343:4-6). On May 15, 1984, Licate accompanied Ashley to Columbus, Ohio to attend a hearing on his grievance. On the way, Licate and Ashley discussed the Ashtabula non-Union operations. From Ashley's remarks, according to the Board and the Sixth Circuit, Licate learned for the first time that Ashtabula's non-Union drivers were performing bargaining unit work. Appendix at A19, *infra.*

In April 1984, Licate and an official of Greenleaf commenced negotiations for a successor agreement to the one expiring in July 1984. On June 5, 1984 the Union submitted a contract proposal demanding that Greenleaf and Ashtabula honor the recognition clause in the National Master Freight Agreement and thereby require the employees of Ashtabula to become members of Teamsters Local No. 377. Greenleaf rejected this proposal. Appendix at A42-43, *infra.*

On September 12, 1984, the Union filed an unfair labor practice charge and on October 31, 1984, the Board issued its original complaint in this matter. A hearing was held and the ALJ found, among other things, that Greenleaf had illegally refused to bargain over the status of Ashtabula's drivers. Exceptions were filed to this decision and the Board remanded the case to the ALJ for further credibility determinations. After these determinations were made the Board adopted and affirmed the ALJ's recommendations that the Company had violated Sections 8(a)(1) and (5) of the National Labor Relations Act by, among other things, refusing to apply

"the same conditions of employment upon its non-union men that the contract called for." *See* ALJ's recommendation, Appendix at A47, *infra*.[4] It rejected Petitioners' argument that the charge regarding the refusal to bargain was untimely. Petitioners argued that any unfair labor practice arising out of the inclusion or exclusion of Ashtabula's employees in the bargaining unit was based on events known or that should have been known to the Union for more than six-months prior to the filing of the charge herein. The Board adopted the ALJ's finding that the Union was not aware of Greenleaf's and Ashtabula's operation until May 1984.

On January 21, 1988 the Board filed an application for enforcement of its Order with the Court of Appeals for the Sixth Circuit. The court agreed with the Board's rationale regarding the timeliness of the charge finding that the Union was not aware of a violation until Licate received unequivocal notice of a violation of the Act on May 15, 1984. The court therefore, enforced the Board's Order.

[4] Petitioners are not seeking review of the Board's findings that Petitioners committed other unfair labor practices.

REASONS FOR GRANTING CERTIORARI

I. THIS COURT SHOULD ARTICULATE WHEN THE NLRA'S 10(b) LIMITATION PERIOD COMMENCES IN ORDER TO ELIMINATE THE CONFLICT AMONG THE CIRCUITS ON THE ISSUE AND TO PROMOTE UNIFORM NATIONAL LABOR POLICY.

A. The Policy Behind Section 10(b) Supports Reversal Of The Sixth Circuit's Decision.

This case squarely places before the Court the question of when a cause of action accrues for purposes of §10(b) of the National Labor Relations Act (hereinafter referred to as the "Act" or the "NLRA"). The Sixth Circuit held that a cause of action does not accrue until a potential charging party receives unequivocal notice that a violation of the Act has occurred. This Court is strongly urged to grant certiorari and determine whether, for purposes of §10(b), a cause of action accrues when a charging party knew or, through the exercise of reasonable diligence, should have known that a violation of its rights has occurred or when the charging party receives unequivocal notice.

While this Court has addressed similar issues in relation to other acts of Congress, *see e.g., Unexcelled Chemical Corp. v. United States,* 345 U.S. 59 (1953) (determination of when a cause of action accrues under the Walsh-Healy Act); *United States v. Kubrick,* 444 U.S. 111 (1979) (determination of when a medical malpractice claim accrues under the Federal Tort Claims Act); and *Delaware State College v. Ricks,* 449 U.S. 250 (1980) (determination of when a cause of action accrues under Title VII), it has not addressed when a cause of action accrues for purposes of §10(b) of the NLRA. In order to eliminate the uncertainty currently faced by Petitioners, other charged parties in unfair labor practice

actions and the Office of the General Counsel of the National Labor Relations Board, this Court is urged to resolve this issue.[5]

This Court has often stated that the purpose of federal labor laws, *inter alia*, is to resolve disputes promptly. *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983); *United Parcel Service v. Mitchell*, 451 U.S. 56 (1981). In fact, in *Mitchell*, 451 U.S. at 68, Justice Stewart, in his concurring opinion, stated that, "Congress enacted §10(b) of the NLRA to protect continuing collective bargaining systems from delayed attack. The six-month bar of §10(b) is designed to strengthen and defend the 'stability of bargaining relationships.' " Quoting *Machinists v. NLRB*, 362 U.S. 411, 425 (1960). In the case of *West v. Conrail*, 481 U.S. 35, 39 n.7 (1987) this Court stated in regard to the limitations period for unfair labor practices that, "they guarantee that [d]efendant is not subject to suit for conduct that occurred more than six-months before the complaining party initiates appropriate legal process . . .."

It is submitted that the Sixth Circuit defeats this purpose by adopting a standard which activates the 10(b) period only after a charging party receives "unequivocal notice" of a violation of its rights. The Sixth Circuit's standard permits a union, employee or employer to sit back and ignore facts which would put reasonable people on notice to at least investigate whether their rights have been violated. Without guidance from this Court, Congress's intent will be defeated and charged parties will be forced to defend stale claims which should logically be barred under §10(b).

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[5] According to the Board's Annual Report for Fiscal Year 1986, 34,435 unfair labor practice charges were filed that fiscal year and back pay of $35.1 million was awarded during that time.

Protecting defendants, or in this case charged parties, from stale claims is, after all, the primary purpose of statutes of limitations. *See, Bendix Autolight Corp. v. Midwesco Enterprises, Inc.*, _____ U.S. _____, 108 S. Ct. 18 (1988); *Crown Cork & Seal, Inc. v. Parker*, 462 U.S. 345 (1983); and *Board of Regents v. Tomanio*, 446 U.S. 478 (1980), wherein it was stated:

> Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system . . .. Thus in the judgment of most legislatures and courts, there comes a point at which the delay of plaintiff in asserting a claim is sufficiently likely either to impair the accuracy of the fact-finding process or to upset settled expectations that a substantive claim will be barred without respect to whether it is meritorious.
>
> *Id.* at 487.

In this case, the Board found, and the Sixth Circuit concurred, that the Union did not receive notice of any alleged violations until May 1984. This is when Ashley supposedly told Licate the specifics of the Greenleaf and Ashtabula operation. A review of the facts of this case reveals that not only is this ruling unsupported by substantial evidence, but it is not in keeping with the scheme of federal labor laws or the purpose behind statutes of limitation.

It cannot be forgotten that the Act not only grants employees the right to organize and negotiate with their employer, but also grants them many weapons to enforce the agreements they negotiate. Perhaps the most important right, at least in the context of this case, is the power to inspect relevant data in the possession of the Employer. *See, Detroit Edison v. NLRB*, 440 U.S. 301 (1979). The Union thus had tools available to it at the inception of the Greenleaf-Ashtabula operation to determine if Petitioners were violating the agreement or

the Act. As this Court stated in *Wood v. Carpenter*, 101 U.S. 135, 143 (1879), "the means of knowledge are the same thing as knowledge itself."

If the Union had exercised its right of inspection it could have reviewed any relevant Employer records to determine if Ashtabula's drivers were performing bargaining unit work and/or whether they belonged in the same bargaining unit with Greenleaf's employees. The Union did not investigate; it sat back and waited until it could no longer bury its head in the sand. This hardly promotes swift resolution of labor disputes as intended under the NLRA. Requiring unequivocal notice before §10(b) begins to run promotes exactly the type of dilatory behavior present in this case. By June 1984, when the Union submitted its contract proposal, and certainly by September 1984, when the Union filed this charge, the Petitioners were justified in believing that any claim the Union had to Ashtabula's employees was extinguished by virtue of the Union's inaction. After all, "[L]imitation periods are intended to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights," *Crown Cork & Seal Co., Inc.*, 462 U.S. 345, 352 (1983). *See also, Burnett v. New York Central Railroad*, 380 U.S. 424, 428 (1965).

When §10(b) of the Act is read in conjunction with the employer's duty to disclose there can be little doubt but that Congress intended the six-month limitations period to begin to run when a person knew or should have known that a violation of its rights had occurred. This standard is totally consistent with the purpose of the Act and the powers Congress gave parties under the Act. It is precisely for this reason that Petitioners urge this Court to grant certiorari. As is demonstrated below, the decisions of the various federal circuits regarding this issue provide little certainty to either employers, employees or the Board.

B. Conflict In The Circuits.

The language of §10(b) is clear that the occurrence of an unfair labor practice triggers the running of the limitations period. However, in the interest of equity, the majority of Federal Circuit Courts have found that the six-month §10(b) period commenced to run (1) "when the injured party knows" or (2) "should have known that his statutory rights were violated." *Amcar Division, ACF Industries v. NLRB*, 592 F.2d 422, 430 (8th Cir. 1979) *reh'g denied* 596 F.2d 1344 (8th Cir. 1979); *See also, Wisconsin River Val. Dist. Council Etc. v. NLRB*, 532 F.2d 47, 53 (7th Cir. 1976); *NLRB v. Pennwoven, Inc.*, 194 F.2d 521, 525 (3d Cir. 1952) (stating that liability accrued when claimants "knew ... or thought they knew, why they were not being called back ..."); *Land Air Delivery, Inc. v. NLRB*, 862 F.2d 354, 360 (D.C. Cir. 1988) petition for cert. filed (May 8, 1989); *Railway Labor Executives' Association v. Southern Railway Company*, 860 F.2d 1038, 1044 n.9 (11th Cir. 1988) (suit under Railway Labor Act, in which §10(b) was "borrowed" as the statute of limitations).

By contrast, the Sixth Circuit in the instant case, established a standard whereby "the period begins to run at the time an employee receives unequivocal notice of an adverse employment action rather than the time that action becomes effective ..." *See*, Appendix at A9, *infra*, *quoting Armco, Inc. v. NLRB*, 832 F.2d 357, 362 (6th Cir. 1987). This standard eliminates any reference to when the charging party should have known of the wrongful acts or any reference to a charging party's obligation to exercise due diligence to determine if its rights have been violated.

Prior to the instant case and *Armco*, the Sixth Circuit employed the majority standard, activating the §10(b) period "when the claimant discovered, or in the exercise of reasonable diligence, should have discovered the acts constituting the alleged violation." *NLRB v.*

Allied Products Corp., 548 F.2d 644, 650 (6th Cir. 1977). Interestingly, the Sixth Circuit alluded to this standard in a footnote to its decision in this matter. Appendix at A12, *infra*. If one reads the footnote with the unequivocal notice standard articulated in the body of the decision, the Sixth Circuit appears to be activating the §10(b) period when the charging party has "unequivocal actual notice" or "unequivocal reason to know." If this is the case, the Sixth Circuit has developed an unworkable standard, because "unequivocal reason to know" is easily interpreted as a contradiction in terms. In any event, if the Sixth Circuit did not intend to discard the requirement that a charging party exercise due diligence, it has certainly developed an unclear and contradictory standard.

In its Petition for Rehearing with Suggestion for Rehearing *En Banc* to the Sixth Circuit, Petitioner specifically noted this conflict between the unequivocal notice standard the Court applied and the standard applied in other circuits. Despite the exposition of this conflict, the Sixth Circuit denied the request for rehearing. Based upon the instant case and *Armco* the Court of Appeals for the Sixth Circuit now appears to activate the §10(b) period either when the aggrieved party receives "unequivocal notice" of some violative activity or pursuant to an unworkable and vague standard which requires unequivocal constructive notice.

The Ninth Circuit has also adopted a standard requiring actual knowledge in order for the statute of limitations to commence to run. In its most recent pronouncement of the standard, the Ninth Circuit stated that "the limitations period does not begin to run until the party filing the charge receives actual notice that an unfair labor practice has occurred." *NLRB v. IBEW*, 827 F.2d 530, 533 (9th Cir. 1987). *See also, American Distributing Company, Inc. v. NLRB*, 715 F.2d 446, 452

(9th Cir. 1983), *cert. denied* 466 U.S. 958 (1984). Thus, the Sixth and Ninth Circuits employ a standard requiring actual or unequivocal knowledge of a violation to activate §10(b)'s limitation period while the Courts of Appeals for the Third, Seventh, Eighth, Eleventh and District of Columbia Circuits apply a standard which fixes the commencement of the §10(b) period when a charging party knew or should have known of a violation. The effect of employing an "unequivocal notice" standard and elimination of the "should have known" requirement not only defeats the aforementioned policies surrounding federal labor laws but is a departure from the historical interpretation placed upon statutes of limitations. The "should have known" standard reflects the adoption of a policy of equitable tolling adopted by this Court in *Bailey v. Glover,* 88 U.S. (21 Wall.) 342 (1874). This Court there found that a statute of limitations did not commence where the "party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part." *Id.* at 347-348. In *Holmberg v. Armbrecht,* 327 U.S. 392, 397 (1946), this Court stated that "this equitable doctrine is read into every federal statute of limitation." Thus, the doctrine is applicable to the National Labor Relations Act.

This Court further refined the equitable tolling principle in *Wood v. Carpenter,* 101 U.S. 135, 143 (1879), by stating that "concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry."[6] In addition to stressing the concealment requirement for tolling the statute of limitations, this Court also stressed the requirement that the Plaintiff's ignorance of the violative activity not be caused by his lack of diligence.

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[6] In *Urie v. Thompson,* 337 U.S. 163, 169 (1949), this Court indicated that if an injury was "inherently unknowable" (self-concealing), that an active concealment need not be shown.

Since the *Wood* decision, federal courts have regularly emphasized the principle that the plaintiff will be barred by a statute of limitations, despite concealment by the defendant, where plaintiff has not acted diligently or has done nothing to investigate. *See, Cook v. Avien, Inc.*, 573 F.2d 685, 689 (1st Cir. 1978); *Arneil v. Ramsey*, 550 F.2d 774, 781 (2nd Cir. 1977); *Hupp v. Gray*, 500 F.2d 993, 997 (7th Cir. 1974); *Prather v. Neva Paperbacks, Inc.*, 446 F.2d 338 (5th Cir. 1971); *Demars v. General Dynamics Corporation*, 779 F.2d 95, 97-99 (1st. Cir. 1985). In the context of the issue presented herein, by activating the §10(b) period when the injured party "should have known" that his rights were violated, the majority of circuits have applied traditional equitable tolling principles to unfair labor practices.

In applying the equitable tolling doctrine such circuits require (1) concealment by the defendant of his wrongful acts (or the acts must be self-concealing or "unknowable" in nature); and (2) a failure by the plaintiff to discover the wrongful acts despite his exercise of due diligence. *See, Demars v. General Dynamics Corp.*, 779 F.2d 95 (1st Cir. 1985); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2nd Cir. 1974); *Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp.*, 546 F.2d 570 (4th CIr. 1976); *Texas v. Allan Const. Co., Inc.*, 851 F.2d 1526 (5th Cir. 1988); *Conmar Corp. v. Mitsui & Co. (U.S.A., Inc.)*, 858 F.2d 499 (9th Cir. 1988) *cert. denied*, _____ U.S. _____, 109 S. Ct. 795 (1989); *State ex rel. Colorado Atty. Gen. v. Western Paving Const. Co.*, 833 F.2d 867 (10th Cir. 1987), *cert denied*, _____ U.S. _____, 109 S. Ct. 179 (1988); *Japanese War Notes Claimants Association of the Philippines (Japwancap, Inc.) v. U.S.*, 373 F.2d 356 (Ct. Cl. 1967), *cert. denied*, 389 U.S. 971 (1967); *Riddell v. Riddell Washington Corp.*, 866 F.2d 1480 (D.C. Cir. 1989).

The issue of whether the §10(b) limitation period begins to run when a charging party had "unequivocal notice" or through the exercise of reasonable diligence should have known that its rights were violated is further muddled by case law evolving from this Court's decision in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983). *DelCostello* held that the six-month limitation period of §10(b) of the NLRA applied to so-called hybrid suits under Section 301 of the Labor Management Relations Act, 29 U.S.C. §185. Despite the inconsistent and conflicting standards employed by the circuits in determining when the §10(b) clock commences to tick in pure unfair labor practice cases under the NLRA, more consistent case law pertaining to the activation of the 10(b) period has evolved in these hybrid cases. In such cases, all circuits which have considered the issue (including the Sixth and Ninth Circuits) have consistently held that the §10(b) period commences when the claimant knew or should have known of the breach of the duty of fair representation and/or breach of the collective agreement.[7]

Neither the Sixth Circuit nor the Ninth Circuit has explained the rationale for applying a less stringent standard for commencing the §10(b) period in hybrid cases as opposed to unfair labor practice cases. If the §10(b) period commences in a hybrid action (where the claimant is always an individual) when the employee knew or should have known of a violation or breach, the same standard should apply in cases involving pure violations of the Act in which a union is the charging party since unions are arguably more sophisticated with regard to labor matters.

[7] *See, Arraiga-Zayas v. International Ladies Garment Workers*, 835 F.2d 11, 13 (1st Cir. 1987), *cert. denied*, _____ U.S. _____, 108 S. Ct. 2016 (1988); *King v. New York Telephone Company, Inc.*, 785 F.2d 31, 33 (2nd Cir. 1986); *Chrysler Workers Association v. Chrysler Corporation*, 834 F.2d 573, 576-578 (6th Cir. 1987), *cert denied* _____ U.S. _____, 108 S. Ct. 2017 (1988); *Galindo v. Stoody Company*, 793 F.2d 1502, 1509 (9th Cir. 1986); *Hill v. Georgia Power Co.*, 786 F.2d 1071, 1075 (11th Cir. 1986).

In the instant case, the issue of whether the tolling of the §10(b) period requires the charging party's exercise of due diligence is decisive. Although the majority of circuits require a plaintiff to exercise due diligence in order to toll federal statutes of limitations, the Sixth Circuit has chosen to activate the §10(b) period only when the charging party has unequivocal notice of the wrongful acts, thus jettisoning the requirement that due diligence be exercised to toll the limitations period. The effect of such a decision, as demonstrated by this case, is to remove any incentive the charging party may have to investigate potential violations of its rights and to promptly seek redress of any violations.

In the present matter, the Board found that the Union's Business Agent "knew about the 'use of broker drivers as early 1982 and 1983 . . ..' " The record makes clear that the Union's Business Agent stated he would "check into" Petitioner's use of non-Union drivers sometime around Christmas of 1982, well outside the §10(b) period. Approximately 21 to 22 months elapsed between the Business Agent's statement that he would check into the non-Union drivers and the filing of the charge in this matter. During this entire period the Petitioner used Union and non-Union drivers in a system of operation that, according to the ALJ and Board was an "integrated operation throughout." Appendix at A38, *infra*. All drivers, both Union and non-Union, worked under common supervision and dispatching, attended safety meetings together, worked under the same employment policies, were paid the same wage scale, serviced the same customers with the same equipment and, at times, ". . . two drivers, one from each group, going out on the same single trip together." Appendix at A37-38, *infra*. No evidence was presented that the Business Agent investigated the activity other than Licate's statement that he would "check into it."

While the Business Agent arguably might not have had unequivocal notice of the violative activity, he definitely had constructive knowledge of Petitioner's operation and, at the very least, should have conducted an investigation. Additionally, the Union Steward, Wright, had actual and unequivocal knowledge of the Petitioner's violative activity because he was working within the Petitioner's integrated system. Under the Sixth Circuit's decision in this case, the Business Agent's and the Union Steward's lack of diligence is rewarded by tolling the limitations period.

This Court has never articulated the standard for determining when the §10(b) period commences to run. In clearly articulating a standard, this Court would eliminate confusion and conflict between the circuits applying the more stringent "unequivocal notice" standard and the circuits employing the "knew or should have known" standard in determining when the §10(b) period is activated.

II. IN PLACING THE BURDEN ON THE CHARGED PARTY TO PROVE THAT THE 10(b) LIMITATIONS PERIOD WAS NOT TOLLED, THE SIXTH CIRCUIT'S DECISION IN THE INSTANT CASE AND THE NLRB'S CURRENT POSITION CONFLICT WITH THE MAJORITY OF FEDERAL CIRCUITS.

A. The Conflict In The Circuits Over The Burden Of Proof.

In its decision in the instant case, the Sixth Circuit stated that, "because Section 10(b) is an ordinary statute of limitations, it is an affirmative defense that must be proved by the party alleging it." Appendix at A9, *infra*. In articulating this rule, the court stated that the Petitioner's arguments pertaining to the statute of limitations failed because no proof had been offered that the union knew or should have known of the violative activity. To the contrary, the ALJ's findings of fact, which were adopted by the Board, demonstrate that there was ample evidence to support Petitioner's contention that the underlying charge in this matter was filed more than six-months after the Union knew or should have known that its rights were violated. In describing the Greenleaf-Ashtabula operation, the ALJ stated, based on the facts as outlined at pages 7 and 19, *supra*, that:

> "It was an integrated operation throughout."

Appendix A38, *infra*.

Thus, there was ample evidence that the charging party should have known of a violation of its rights or through the exercise of reasonable diligence should have discovered acts constituting a violation of the law more than six-months prior to the filing of the charge. As such, it should have been incumbent upon the General Counsel to prove that the statute was tolled for some equitable reason such as concealment by Petitioners. By placing the entire burden of proving the untimeliness of the charge upon Petitioners, the Sixth Circuit's decision requires that a charged party not only prove that a charge was untimely but, in essence, that the reasons for tolling or not tolling the limitations period are met. This is in spite of the fact that no claim of tolling was ever made in the instant matter.

Unlike the Sixth Circuit, the majority of federal circuits hold that a plaintiff has the burden of establishing those facts or elements necessary to justify equitable tolling. These cases establish that in order to toll the statute of limitations a plaintiff must plead and prove three elements: (1) that the defendant wrongfully concealed its actions from the plaintiff; (2) that the plaintiff failed to discover the operative facts forming the basis of the cause of action within the limitations period; and (3) that plaintiff exercised due diligence in attempting to discover these operative facts. *See, Berkson v. Delmonte Corp.*, 743 F.2d 53, 55 (1st Cir. 1984), *cert. denied*, 470 U.S. 1056 (1985); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 460-461 (2d Cir. 1974); *Byers v. Follmer Trucking Company*, 763 F.2d 599, 600

(3d Cir. 1985); *Lukenas v. Bryce's Mountain Resort, Inc.*, 538 F.2d 594, 597 (4th Cir. 1976); *In Re Beef Industry Anti-Trust Litigation*, 600 F.2d 1148, 1169 (5th Cir. 1979); *Hupp v. Gray*, 500 F.2d 993, 996 (7th Cir. 1974); *Conmar Corp. v. Mitsui & Co. (U.S.A.), Inc.*, 858 F.2d 499, 502 (9th Cir. 1988), *cert. denied*, _____ U.S. _____, 109 S. Ct. 795 (1989); *State ex rel. Colorado Atty. Gen. v. Western Paving Const. Co.*, 833 F.2d 867, 874 (10th Cir. 1987), *cert. denied*, _____ U.S. _____, 109 S. Ct. 179 (1988).

In the case of *City of Detroit v. Grinnell Corp.*, 495 F.2nd 448, 460-61 (2nd Cir. 1974) the court stated that once it appears that the limitations period has run the plaintiff must show that he failed to discover the violation prior to the running of the limitations period even though he exercised due diligence because of some affirmative act of defendant to conceal the asserted violation. The court in *Grinnell* rejected the plaintiff's contention that the defendant had the burden of proving that plaintiff had actual or constructive knowledge of the facts giving rise to the cause of action. The court stated that the burden of proof was on the plaintiff and not the defendant. The Fifth Circuit has described this burden of proving fraudulent concealment as a "heavy one". See *In Re Beef Industry Anti-Trust Litigation*, 600 F.2nd 1148, 1171 (5th Cir. 1979) *cert. denied*, 449 U.S. 905 (1980). Furthermore, in regards to a party's duty to exercise due diligence to discover a violation, the court in *Hupp v. Gray*, 500 F.2nd 993, 996 (7th Cir. 1974) stated that, "the statutory period does not await appellants leisurely discovery of the full details of the alleged scheme."

By contrast, the Sixth Circuit in the instant case, has effectively placed the entire burden of proving the untimeliness of an action upon the Petitioners herein. In all of the previously referred to circuits, however, the plaintiff bears the burden of proving the elements of equitable tolling as opposed to the defendant proving the doctrines' inapplicability.

The Sixth Circuit therefore reviewed this case under an erroneous apportioning of the burden of proof. In essence, it requires a charged party to not only prove that it did not conceal its violations from the charging party, but also that the charging party failed to discover the violative acts or through the exercise of due diligence could not. In the instant matter, the ALJ specifically found that Petitioner violated the Act from 1982 onward.[8] Appendix at A39, *infra*. As such, there was evidence that the violations occurred outside the six-month limitations period. At this point the burden should have shifted to the General Counsel to prove that the six-month limitation period was tolled. It should not be Petitioner's burden to prove the opposite.

B. As A Matter Of Policy And In Order To Provide A Uniformity Of Approach For Reviewing Circuit Courts Of Appeal This Court Should Decide The Manner In Which The Burden Of Proof Is Imposed In Statute Of Limitations Cases.

While the Board has not addressed this shifting of the burden of proof in relation to the statute of limitations it has applied such a scheme in other situations. This Court, in the case of *NLRB v. Transportation Management*, 462 U.S. 393 (1983), affirmed the Board's application of a shifting burden of proof in so called mixed-motive cases where an employer arguably may have a legitimate and an illegitimate reason for taking action against an employee. In *Transportation Management*, this Court, and the Board, held that once the General Counsel made a *prima facia* case of an unfair labor practice the burden of proof shifted to the employer to prove that its decision was motivated by legitimate business reasons. If the employer carries its burden, the burden then shifts back to the General

[8] Curiously, the Board rejected this finding because it would conflict with the 10(b) limitation period. However, the Board cannot make a charge timely simply by ignoring the facts. Either the violation occurred within or without the six-month limitation period.

Counsel to prove that the employer's asserted reason for its actions is merely a pretext for discriminatory activity. There is no reason this shifting burden of proof should not be utilized to resolve timeliness issues as well. In the context of this case, once the Petitioner demonstrated that the unfair labor practice occurred more than six-months prior to the charge being filed, the burden of proof should be shifted to the General Counsel to prove the elements of equitable tolling.

Under other statutes of limitations, once a defendant proves that an action is untimely at least one circuit requires the plaintiff to come forward with evidence to prove that it could not have discovered the cause of action, even through the exercise of due diligence, because of some affirmative act of concealment on the part of the defendant. See *Riddell v. Riddell Washington Corp.*, 866 F.2d 1480, 1492 (D.C. Cir. 1989); *Hobson v. Wilson*, 737 F.2d 1, 35 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985); *Richards v. Mileski*, 662 F.2d 65, 75 (D.C. Cir. 1981) (stating that the defendant would then have "the burden of coming forward" with any facts showing that the plaintiff could have discovered . . . the cause of action if he had exercised due diligence.").

In proving that a charge is untimely, the NLRB, like the Sixth Circuit, requires the charged party, rather than the General Counsel, to prove that the statute of limitations was not tolled. There is no shifting of the burden of proof. The charged party must bear the entire burden of proof and show that the charging party either knew or should have known of the violative activity. *Harvard Folding Box Co.*, 273 NLRB No. 113, (1984). The result of such a standard leads to the Board making broad assumptions as it did in this case. Although the General Counsel never submitted any evidence on the tolling issue, the Board merely assumed that Petitioner's violations of the Act were not discovered sooner because they were concealed from the Union. Appendix at A18-19 and A40, *infra*. Such a determination, however, should be based upon evidence and not speculation.

The impropriety of placing this entire burden on a charged party is further magnified by the lack of discovery mandated by law and regulations in NLRB proceedings. *See,* Section 102.118 of the Board's Rules and Regulations. Only under extreme circumstances will discovery be permitted. In a case such as the instant one, there is no way for a charged party to determine, absent pre-hearing discovery, how to prepare its case. It has no way of knowing, prior to hearing, what the Union knew or should have known or even which individuals possessed this information. Applying the standard employed by the majority of the circuits leads to a much more equitable result. The burden of proving the applicability, as opposed to the non-applicability, of the doctrine of equitable tolling would be placed upon the party with knowledge of the facts necessary for such a determination.

Upon a petition for enforcement of an NLRB order, the courts of appeals are charged with determining whether the evidence supporting the Board's decision is substantial when viewed in light of the record as a whole. *Universal Camera v. NLRB,* 340 U.S. 474, 488 (1951). However, this review of the record is meaningless if a court is applying incorrect legal principles. Here, the outcome of the Sixth Circuit's review of the record, based upon its determination that Petitioners bore the burden of proof on the statute of limitations issue, resulted in the Court finding that Petitioner was unable to establish that the charge was untimely. By contrast, if this same set of facts had been placed before the District of Columbia Court of Appeals, it is respectfully submitted that a different result would have been obtained because the General Counsel offered no evidence entitling it to the benefit of the doctrine of equitable tolling. Not one shred of evidence was introduced demonstrating, for instance, that the Union had exercised due diligence prior to the running of the limitations period to investigate whether its rights had been violated.

In order to avoid such inconsistent results, it is critical that uniform principles be developed to determine who bears the burden of proving whether the 10(b) limitations period is tolled. If principles applied by the courts of appeals and the NLRB are not uniform, a case's outcome will be determined solely by virtue of the circuit it arose in. Even worse, if an employer does business in more than one circuit an unfair labor practice charge filed against it in one circuit could be held timely whereas a charge filed against it in another circuit would be untimely. This hardly promotes a stable and uniform federal labor policy. Additionally, the courts of appeals will sit as trial courts weighing the evidence under their particular burden of proof rules.

This Court should clearly articulate which party shoulders the burden of proving whether the 10(b) statute of limitations is tolled so the NLRB will decide cases, and the courts of appeals will analyze records, based upon the same burden. In the instant case, neither the General Counsel nor the charging party produced any evidence showing that the charging party investigated or even inquired about the Greenleaf-Ashtabula operation or that through the exercise of reasonable diligence it could not have discovered the violation. This Court should grant certiorari to decide this critically important question and thereby provide appropriate guidance to the Board and the courts.

CONCLUSION

For the above-stated reasons this Petition for Certiorari should be granted. This Court should resolve the conflict and confusion in the circuits over whether §10(b) of the NLRA begins to run when a charging party knew or should have known that its rights had been violated. With over 34,000 unfair labor practice charges filed each year and back pay awards exceeding $35 million, the importance of this issue cannot be ignored.

Furthermore, the burden of proving the timeliness of a charge or proving the reasons why the limitations period should be tolled should be placed upon the General Counsel once the charged party shows that a violation occurred outside of Section 10(b). To place the burden on the charged party is patently unfair and inconsistent with the principles developed under other statutes of limitations.

If this Court determines full review is not warranted, then Petitioner requests the Court to grant certiorari and summarily reverse the decision of the Sixth Circuit and the Board.

Respectfully submitted,

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APPENDIX

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

(Filed May 18, 1989)
Leonard Green, Clerk

No. 88-5094

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

GREENLEAF MOTOR EXPRESS, INC., ET AL.,
Respondents.

ORDER

BEFORE: KEITH, MARTIN and RYAN, *Circuit Judges.*

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
LEONARD GREEN, *Clerk*

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed March 29, 1989)

[NOT RECOMMENDED FOR FULL-TEXT PUBLICATION]

No. 88-5094

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

GREENLEAF MOTOR EXPRESS, INC.
AND ASHTABULA CHEMICAL CORP.,
Respondent.

ON APPEAL FROM THE NATIONAL
LABOR RELATIONS BOARD.

KEITH, *Circuit Judge:* The National Labor Relations Board ("the Board") petitions this court to enforce its order against Greenleaf Motor Express, Inc. ("Greenleaf"), a union shop, and Ashtabula Chemical Corporation ("Ashtabula"), a non-union shop, which together constitute a single employer ("the Company") for purposes of enforcing provisions of the National Labor Relations Act ("the Act") (29 U.S.C. §§151-188). The Board's order is reported at 286 N.L.R.B. 117 (1987).

The order requires the Company to cease and desist from its unfair labor practices, which involve the maintenance of double-breasted operations; and to bargain with the International Brotherhood of Teamsters, Warehousemen and Helpers of America, Local 377 ("the Union"), as the representative of *all* employees in the appropriate bargaining unit. For the following reasons, we ENFORCE the order of the Board.

I.

A.

The Company is composed of two trucking concerns engaged in the interstate and intrastate transportation of bulk chemicals. The Company originally operated Greenleaf, a union shop. For over thirty years, Greenleaf and the Union have been parties to collective bargaining agreements that define the bargaining unit as including all "drivers" or "driver-helpers" operating vehicles for "transportation purposes." The bargaining agreements require that all covered employees join the Union within 31 days of initial employment.

In 1979, the Company formed a separate trucking concern, Ashtabula, a non-union shop. Ashtabula began to hire brokers—truck owner-operators—to haul loads in 1982. Ashtabula's owner-operators leased their trucks to Greenleaf and received separate payments from Greenleaf for their driving services. At all relevant times, Ashtabula and Greenleaf shared common facilities and equipment, operating out of a single location in Ashtabula, Ohio.

In October, 1983, the Company eliminated the brokerage operation and placed the owner-operators on Ashtabula's payroll. The Ashtabula driver-employees

were leased exclusively to Greenleaf to drive Greenleaf trucks. The Company then formulated and administered a common labor policy affecting the union Greenleaf drivers and the non-union Ashtabula drivers. All drivers worked under the same supervisor; attended combined safety meetings; and were held to the same work rules. Moreover, all drivers served the same customers. Greenleaf drivers were sometimes paired with Ashtabula drivers on a single trip in the same truck. In addition, all drivers were paid at the same rates, but amounts deducted from the Greenleaf drivers' wages for union health, welfare and pension benefits were not deducted from the Ashtabula drivers' wages. Even though the Company operated Greenleaf and Ashtabula as a single integrated business enterprise, the Company did not enforce the collective bargaining agreement by requiring the Ashtabula drivers to join the Union within 31 days of employment.

On May 15, 1984, Union Business Agent Frank Licate accompanied Greenleaf Driver Jerry Ashley to Columbus, Ohio, to attend a grievance hearing. From Ashley's remarks on the trip, Licate learned for the first time that the non-union Ashtabula drivers were performing bargaining unit work. On June 5, 1984, Licate began negotiating a new collective bargaining agreement by submitting the Union's contract proposal to the Company. The proposal stated, in part, that:

> Greenleaf Motor Express and Ashtabula Chemical must honor the recognition clause in the National Master Freight Agreement by informing all Ashtabula Chemical employees to become members of Teamsters Local Union 377 after thirty one (31) days of employment.

By an informal telephone call on June 5, 1984, and by a formal grievance filed on June 6, 1984, Licate again informed the Company that Greenleaf and Ashtabula were not in compliance with the collective bargaining agreement.

On July 7, 1984, the Company conducted a safety meeting for Ashtabula drivers and Greenleaf drivers. Company officials stated that they wanted Ashtabula drivers to remain non-union while Greenleaf drivers remained in the Union. The Company officials then outlined the advantages and disadvantages of union membership and the costs of union benefits. One official stated that the Company would establish an employer-employee committee to provide the drivers with independent representation and to make the Union obsolete.

On August 18, 1984, the Union drivers voted to reject the Company's contract proposal because it limited the bargaining unit to drivers receiving all their wages from Greenleaf. Licate's request that the Company officials engage in additional bargaining was refused.

On August 25, 1984, Company officials met separately with the Greenleaf drivers and the Ashtabula drivers. The Greenleaf drivers were polled and asked to indicate their support or rejection of the Union demand that the Ashtabula drivers be required to join the Union. The Greenleaf drivers unanimously voted that they had no preference. At the meeting with the Ashtabula drivers, the Company officials discussed the cost of benefits and union dues that would be required if the drivers joined the Union. The employees were then polled as to their Union sentiments. The Ashtabula drivers voted 10-4 against joining the Union.

B.

On September 12, 1984, the Union filed charges of unfair labor practices with the Board. A complaint was issued on behalf of the General Counsel on October 31, 1984. After the Administrative Law Judge ("ALJ") issued an opinion on May 22, 1986, the Board issued its order on September 17, 1987.

The Board found that Greenleaf and Ashtabula constitute a single employer for purposes of the Act and that the Union drivers employed by Greenleaf and the non-union drivers employed by Ashtabula all form a single appropriate bargaining unit. Accordingly, the Board found that the Company's refusal to bargain with the Union as the representative of Ashtabula's employees violated Sections 8(a)(5) and (1) of the Act (29 U.S.C. §158(a)(5) and (1)). The Board also found that the Company violated Section 8(a)(1) of the Act (29 U.S.C. §158(a)(1)) by polling its employees on whether they agreed with lawful Union demands and membership policy; by excluding Union officials and dealing directly with the employees; by interrogating the employees about their Union sentiments; and by promising the employees that the Company would establish an employer-employee committee to replace the Union.

The Board's order requires the Company to cease and desist its interference in the employees' exercise of their rights guaranteed by Section 7 of the Act (29 U.S.C. §157). Affirmatively, the order requires the Company to bargain with the Union as the representative of *all* employees in the single appropriate bargaining unit. The Board's decision also requires the Company to provide notice of the order and to pay monetary benefits to each employee that was unlawfully

classified as "non-union," from March 12, 1984, until such time as the Company and the Union enter into an alternative collective bargaining agreement.

On January 21, 1988, the Board filed an Application for Enforcement before this court. On February 3, 1988, the Company filed an Answer to the Board's Application.

II.

Conceding that its failure to bargain with the Union as the representative of Ashtabula's drivers was unlawful under Sections 8(a)(5) and (1) of the Act, the Company contends that the Union's unfair labor practice charges were untimely under Section 10(b) of the Act (29 U.S.C. §160(b)). The Company also disputes the Board's finding that the Company interfered with its employees' exercise of rights guaranteed by Section 8(a)(1) of the Act.

A.

The Company argues that the Union's unfair labor practice charge, under Sections 8(a)(5) and (1), is barred by the statute of limitations. The Company relies on Section 10(b) of the Act which states that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board . . ." 29 U.S.C. §160(b). The Company argues that it began its illegal conduct in 1982, when it first hired non-union Ashtabula drivers, and that the Union has known of this conduct since 1982. The Company concludes that since the Union did not file an unfair labor practice charge until September 12, 1984, the Company is now immune from prosecution.

Our consideration of the Company's defense is animated by two concerns. First, because Section 10(b) is an ordinary statute of limitations, it is an affirmative defense that must be proved by the party alleging it. *See NLRB v. Mueller Brass Co.*, 509 F.2d 704, 708 (5th Cir. 1975). Second, to sustain its Section 10(b) defense, the Company must prove that the factual conclusions of the Board are in error. The Company specifically challenges the Board's finding that the Union did not know of the nature or significance of the Company's unlawful conduct until May, 1984. Before examining this argument at length, we note that findings of fact made by the Board are to be accepted as correct on review if they are supported by substantial evidence on the record as a whole. 29 U.S.C. §160(e); *NLRB v. A & T Manufacturing Co.*, 738 F.2d 148, 149 (6th Cir. 1984).

In *NLRB v. Allied Products Corp.*, 548 F.2d 644, 650 (6th Cir. 1977), we endorsed the Board's holding that the Section 10(b) "six month limitation period does not begin to run until the employer's unlawful activity, which is the basis for the unfair labor practice charge, has become known to the charging party." *Id. See also Armco, Inc. v. NLRB*, 832 F.2d 357, 362 (6th Cir. 1987) ("[W]e agree with the Board's statement in [*United States Postal Service Marina Mail Processing Center*, 271 N.L.R.B. 397, 400 (1984)], that the 10(b) period begins to run at the time an employee receives unequivocal notice of an adverse employment action rather than the time that action becomes effective . . .").

Reviewing the record in this case, the Board explained:

> The record is clear that [Union Business Agent] Licate first learned about [the Company's] using non-union drivers alongside unit employees in May

> 1984, within the 6-month period of Section 10(b) of the Act, and that he immediately investigated and protested the matter. For these reasons—including the changing nature of the Ashtabula operation, the reasonable understanding of the Greenleaf drivers, and the swift and staunch reaction by [Licate] once he learned that the [Company] was using unrepresented drivers to do bargaining unit work—we find no basis for concluding that the Union condoned the [Company's] activities or in any way waived its representational rights over the Ashtabula drivers.
>
> 268 N.L.R.B. 117.

The Board's decision was based, in part, on its finding that the changing nature of the Company's operations precluded the Union from knowing that the non-union Ashtabula drivers were infringing on bargaining unit work until 1984. The Company responds that in 1982, its violation of the collective bargaining agreement was open and notorious, and that such open and notorious conduct was sufficient to activate the Section 10(b) period. *See, e.g., Contractors Health & Welfare Plan v. Harkins Construction and Equipment Co.*, 733 F.2d 1321 (8th Cir. 1984). We find the Company's argument unpersuasive. First, because the Company used Ashtabula owner-operators before hiring Ashtabula employee-drivers in 1983, it is reasonable to assume that the Union did not immediately know that the Company was circumventing the collective bargaining agreement through the creation of a non-union workforce. *See NLRB v. Anthony Co.*, 557 F.2d 692, 696 (9th Cir. 1977) (concluding that the Board is free to make reasonable inferences on direct and circumstantial evidence). Second, the Union could have reasonably assumed that even in 1983, the Ashtabula employee-drivers, who worked in a different state, were

owner-operators without a sufficient shared "community of interests" to comprise a single appropriate bargaining unit with the Greenleaf drivers. *See, e.g., South Prairie Construction Co. v. Local No. 627,* 425 U.S. 800, 805 (1976). Third, the Company's argument that its conduct was open and notorious is rebutted by the grievance proceedings of Ashley, who informed the Union of the non-union Ashtabula employee-drivers in May, 1984. The Company fought the Ashley grievance through arbitration and steadfastly argued that the Ashtabula drivers were not working in violation of the collective bargaining agreement. Thus, the Company did not openly engage in unlawful conduct, but effectively concealed its violations of the labor agreement. *Cf. NLRB v. Don Borgess Const. Corp.,* 596 F.2d 378, 382 (9th Cir. 1979) (stating that intentional fraudulent concealment tolls a statute of limitations).

The Board's decision also rests on the testimony of the Union officials, which the Board credited over the testimony of the Company officials. We note that such credibility resolutions will be sustained unless they are found to be inherently unreasonable. *Colfor, Inc. v. NLRB,* 678 F.2d 655, 656 (6th Cir. 1982).

The Board reasonably credited the testimony of Union Steward Wright, a Greenleaf driver, who stated that he did not know when the non-union Ashtabula drivers were transferred from Greenleaf's payroll, as owner-operators, to Ashtabula's payroll as employee-drivers. Thus, because the union Greenleaf drivers were unclear on the changing status of the Ashtabula drivers, the Union officials did not learn, until 1984, that the bargaining unit was affected by the Ashtabula operational changes.

The Board also reasonably credited the testimony of Union Business Agent Licate, who stated that he did not learn of the Company's infringement on the bargaining unit work of Greenleaf drivers until his conversations with Ashley in May, 1984. The Board correctly concluded that Licate's swift protest action after his conversation with Ashley strongly suggested that if he had had the same information earlier, he would have acted on it. Licate, however, only gained knowledge of the Company's unlawful conduct in May, 1984. He then filed timely unfair labor practice charges against the Company in September, 1984, well in advance of the six-month limitation imposed by Section 10(b).

Therefore, we are persuaded that substantial evidence exists to support the Board's finding that the Union did not know of the Company's unfair labor practices until May, 1984. The Board's holding that the Union did not acquiesce to the Company's unlawful conduct nor waive its right to represent the Ashtabula drivers must be accepted.[1]

B.

The Company also challenges the Board's findings that, in addition to its violations of the collective bargaining agreement, the Company also committed several independent violations of Section 8(a)(1) of the Act (29 U.S.C. §158(a)(1)). The ALJ observed that there was a strong relationship between the Company's coercive conduct directed at individual employees—violations of Section 8(a)(1)—and the

[1] The Company's arguments based on the equitable doctrines of laches and estoppel, like its Section 10(b) argument, are unpersuasive. All three of these arguments lack an essential element-knowledge. No proof has been offered to show that the Union knew or had reason to know, prior to May, 1984, that the Company had changed the status of the non-union Ashtabula drivers and had failed to require them to join the Union, thus violating the collective bargaining agreement.

Company's unlawful conduct directed at the Union. The Board found that the Company's violations included: (1) bypassing the Union and dealing directly with the bargaining unit employees; (2) promising to form an employer-employee committee to resolve employee complaints independent of the Union, (3) interrogating employees about their Union sentiments; and (4) polling employees concerning their support of Union demands and desire for Union membership. The Company responds that all of the Board's findings as to its Section 8(a)(1) violations are in error, for the Company never engaged in conduct that suggested an "element of coercion or interference" in the employees' exercise of rights guaranteed by the Act. *See Midwest Stock Exchange v. NLRB*, 635 F.2d 1255, 1267 (7th Cir. 1980). Our review of the record, however, persuades us that the Company's argument lacks merit.

On July 7, 1984, Company officials told the non-union Ashtabula drivers and the union Greenleaf drivers that they did not need the Union, and then promised to establish an employer-employee committee to protect the drivers' interests. In *NLRB v. Delight Bakery, Inc.*, 353 F.2d 344, 345 (6th Cir. 1965), we held that even though no "heavy-handed, coercive devices" were used, an employer's efforts to form an employer-employee committee to resolve grievances "while disputing the bargaining unit and refusing to bargain with the [u]nion" violates Section 8(a)(1) of the Act. *Id.* Considering the record in this case, we conclude that the Board reasonably found that the Company's promises of an employer-employee committee and direct dealing with bargaining unit employees constituted violations of the Act. *See id.*

The Board's additional finding, that the Company's polling and interrogation of its drivers was coercive and unlawful, is also supported by substantial evidence. On August 25, 1984, Company officials polled the non-union Ashtabula drivers as to their desire to join the Union, but only after explaining the *costs* of Union membership. The Company officials also polled the union Greenleaf drivers as to their support of the Union demand that Ashtabula drivers be included in the bargaining unit. The ALJ drew a reasonable inference that the Company was motivated by a desire to resolve its conflicts with the Union through direct dealing with individual employees.

In *Thomas Industries, Inc. v. NLRB*, 687 F.2d 863, 869 (6th Cir. 1982), we adopted the employer polling guidelines set forth by the Board in *Struksnes Construction Co.*, 165 N.L.R.B. 1062, 1063 (1967):

> [The guidelines require that:] (1) the purpose of the poll is to determine whether the union enjoys majority support; (2) the purpose is communicated to the employees; (3) assurances against reprisals are given; (4) the employees are polled by secret ballot; and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.

Thomas Industries, Inc., 687 F.2d at 869.

In this case, the Company did not meet the first *Struksnes* guideline. The Company failed to posit objective evidence that the Union suffered a loss of majority support. Thus, the Company cannot sustain its argument that the poll was a legitimate tool of inquiry. *See Thomas Industries, Inc.*, 687 F.2d at 869. In addition, the Company did not meet the fifth *Struksnes* guideline. By failing to require the Ashtabula drivers to

join the Union within 31 days of initial employment, pursuant to the terms of the collective bargaining agreement, the Company engaged in an independent unfair labor practice that created a coercive atmosphere in the workplace. *See id.* at 869. Thus, the Company cannot sustain its argument that the poll was non-coercive. We conclude that the Board reasonably found that the Company's polling and interrogation of its employees constituted a violation of the Act.

V.

For the foregoing reasons, ENFORCEMENT of the Board's order is granted.

DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

(Dated September 17, 1987)

Case Nos. 8-CA-17792, 8-CA-18146

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

GREENLEAF MOTOR EXPRESS, INC. AND ASHTABULA CHEMICAL CORP.

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL NO. 377, a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

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DECISION AND ORDER

On 26 December 1985 Administrative Law Judge Thomas A. Ricci issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed exceptions and a supporting brief. Thereafter on 16 April 1986 the Board remanded the proceeding to the judge for further consideration of certain testimony and resolutions of credibility. On 22 May 1986 the judge issued the attached supplemental decision. The Respondent filed exceptions and a brief in support. Subsequently the Respondent also filed a

motion to remand to the judge for the purpose of considering newly discovered evidence, along with supporting affidavits.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision, the supplemental decision, and the record[1] in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions, as modified,[3]

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[1] The Respondent's motion to remand the proceeding to the judge for the purpose of considering evidence relating to a 1982 agreement between Greenleaf and the International Union is denied, as there is no showing that the alleged evidence could not have been proffered earlier in the proceeding, there is no contention that the Respondent currently has such evidence in its possession, and even if such evidence were available, its production would not alter the disposition of the case.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We do not affirm the judge's statement in the portion of his decision entitled "III. The Unfair Labor Practices," that the Respondent has engaged in conduct violative of Sec. 8(a)(5) since 1982. Such a finding reaches beyond the 10(b) period, is not alleged in the complaint, and is unnecessary to the resolution of the issues in the case.

[3] The General Counsel has excepted to the judge's failure specifically to include in his Conclusions of Law a reference to his factual findings that on 25 August 1984 during the conduct of an unlawful poll, the Respondent, by its supervisor, Richard Higley, bypassed the Union and dealt directly with unit employees and interrogated them about their union sentiments. As the record supports the judge's factual findings of 8(a)(1) violations based on direct dealing and interrogation, we add them to the Conclusions of Law. The Order and notice have been revised accordingly.

(Footnote continued on following page.)

and to adopt the recommended Order as modified[4] and set forth in full below.

In adopting the judge's finding that the Union did not know about or acquiesce in the Respondent's exclusion of the Ashtabula drivers from the Union, we note that while Greenleaf employees, including union steward Robert Wright, were aware of Ashtabula's existence, the two groups of drivers initially worked in entirely different geographic areas, approximately 150 miles apart, had no regular contact with each other, and were unlikely to have any knowledge or concern about the others' terms and conditions of employment or union status. Moreover, the Ashtabula drivers worked in a different State, outside the jurisdiction of Local Union 377. Further, during 1982 and 1983 Ashtabula functioned as a brokerage operation whereby owner-operators leased their trucks to the company and received separate payments for equipment rental and their driving services. Because this system existed for some months before the Respondent, apparently in late 1983, ceased using brokers and also began intermittent

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(Footnote continued from preceding page.)

We agree with the judge's conclusion that all drivers of the Respondent—Greenleaf and Ashtabula together—constitute a single appropriate unit for bargaining and that the community-of-interest factors he recites support this determination. See, e.g., *Naccarato Construction Co.*, 233 NLRB 1394 (1977); *Appalachian Construction*, 235 NLRB 685 (1978); *Better Building Supply Corp.*, 259 NLRB 469 (1981); *Neighborhood Roofing & Contracting*, 276 NLRB 861 (1985).

[4] The General Counsel requests a visitatorial clause authorizing the Board, for compliance purposes, to obtain discovery from the Respondent under the Federal Rules of Civil Procedure subject to supervision of the United States court of appeals enforcing this Order. Under the circumstances of this case, we find it unnecessary to include such a clause. *Nathan's Furniture Store*, 278 NLRB No. 34 (Jan. 28, 1986).

assignments of drivers from both companies on the same runs, it is reasonable that none of the Greenleaf employees, including Wright, would have known immediately that the Respondent thereby was circumventing its bargaining obligation and creating a parallel nonunion work force to perform bargaining unit work. Wright testified that although he knew two Ashtabula drivers, he did not know during the time they were employed that they were nonunion. Further, Wright testified that he did not inform Union Business Agent Frank Licate that Ashtabula was operating with nonunion drivers. Licate's testimony establishes that while he knew about Ashtabula's use of broker-drivers as early as 1982 and 1983, he was not then aware of its having any impact on the Greenleaf operation or its infringing on bargaining unit work. The record is clear that Licate first learned about the Respondent's using nonunion drivers alongside unit employees in May 1984, within the 6-month period of Section 10(b) of the Act,[5] and that he immediately investigated and protested the matter. For these reasons—including the changing nature of the Ashtabula operation, the reasonable understanding of the Greenleaf drivers, and the swift and staunch reaction by the union business agent once he learned that the Respondent was using unrepresented drivers to do bargaining unit work—we find no basis for concluding that the Union condoned the Respondent's activities or in any way waived its representational rights over the Ashtabula drivers.

[5] Because the Union's knowledge of this practice and the Respondent's refusal to bargain on demand occurred within the 10(b) period, Chairman Dotson finds it unnecessary to pass on the judge's alternative analysis concerning continuing violations of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Greenleaf Motor Express, Inc., and Ashtabula Chemical Corp., Ashtabula, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with International Brotherhood of Teamsters, Warehousemen and Helpers of America, Local 377, as the exclusive bargaining representative of all the employees in the appropriate bargaining unit, concerning wages, hours, and conditions of employment.

(b) Polling its employees whether they wish to become members of the Union.

(c) Polling its employees to inquire whether they agree with the proper demands of their exclusive bargaining agent in the collective-bargaining process.

(d) Bypassing the Union and dealing directly with unit employees.

(e) Interrogating employees about their union sentiments.

(f) Promising its employees to form an employee-employer committee to resolve employee complaints apart from the statutory bargaining agent.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request of the Union, bargain collectively with the Union in good faith regarding rates of pay, wages, hours of employment, and other terms and conditions of employment for all employees in the appropriate bargaining unit and, if an agreement is reached, reduce the agreement to writing and sign it. The bargaining unit is:

> All over-the-road truckdrivers employed by the Respondent—both Greenleaf Motor Express, Inc. and Ashtabula Chemical Corporation—excluding all supervisors as defined in the Act.

(b) Make whole any of its employees in the appropriate bargaining unit for any monetary benefits they may have been denied for being classified "Ashtabula" employees during the period 12 March 1984 to the time the Respondent may alter the conditions of employment following good-faith bargaining with the Union.

(c) Post at its place of business in Ashtabula, Ohio, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. 17 September 1987.

Donald L. Dotson,
Chairman
Wilford W. Johansen,
Member
James M. Stephens,
Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with International Brotherhood of Teamsters, Warehousemen and Helpers of America, Local No. 377, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America on request.

WE WILL NOT poll our employees to inquire whether they agree with the proper demands of their exclusive bargaining agent in the collective-bargaining process.

WE WILL NOT bypass the Union and deal directly with our employees who are members of the bargaining unit.

WE WILL NOT interrogate our employees concerning their union sentiments.

WE WILL NOT promise our employees that we will form an employee-employer committee to resolve complaints apart from their statutory bargaining agent, in this case, the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, recognize and bargain collectively in good faith concerning rates of pay, wages, hours, and other terms and conditions of employment with the Union as the exclusive bargaining representative of the

employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement. The appropriate bargaining unit is:

> All over-the-road truckdrivers employed by the Employer—both Greenleaf Motor Express, Inc. and Ashtabula Chemical Corporation—excluding all supervisors as defined in the Act.

WE WILL make whole any of our employees in the appropriate bargaining unit for any monetary benefits they may have been denied by virtue of their "Ashtabula" classification during the period 12 March 1984 to the time we may alter the conditions of employment following good-faith bargaining with the Union.

GREENLEAF MOTOR EXPRESS, INC.
AND ASHTABULA CHEMICAL CORP.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Anthony J. Celebrezze Federal Building, 1240 E. 9th Street, Room 1695, Cleveland, Ohio 44199, Telephone 216-522-3733.

SUPPLEMENTAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

(Dated May 22, 1986)

Cases 8-CA-17792
8-CA-18146

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
DIVISION OF JUDGES

GREENLEAF MOTOR EXPRESS, INC.
ASHTABULA CHEMICAL CORP.,

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL NO. 377, a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA.

SUPPLEMENTAL DECISION

THOMAS A. RICCI, A.L.J.: On 26 December 1985, I issued a Decision in this proceeding, finding, among other things, that the Respondent Company had unlawfully insisted upon separating two groups of employees, treating one as though they were not represented by the Union, the Charging Party here, and the other as properly within a bargaining unit represented by the Union. One of the defense contentions by the Respondent was that in the talking that took

place between the parties—the Company insisting that the first group, which it called the "nonunion" employees, must remain unrepresented by the Union and the Union demanding that all the employees must be included in a single collective-bargaining contract—the Union agreed to the exclusion of the "nonunion" men. My finding, based upon the totality of the evidence, was that the Union had not agreed to such an arrangement.

On 16 April 1986, the Board remanded the proceeding to me for further consideration of the testimony of two witnesses—Robert Wright and Lester Clement—whose testimony touched upon that question. I have completely reexamined the testimony of those two witnesses, as well as the transcript record in its entirety, and hereby reaffirm my findings and conclusions in every respect as previously made.

Clement was the last witness called by the Respondent in defense. He said he is a truckdriver and was present at the bargaining sessions. He started by saying that one day on 18 July, one of the first bargaining sessions, the Union principal spokesman, Business Agent Licate, wanted the nonunion men in the Union. And then the witness added: "And then they changed, his changed his mind and said he didn't want them in." As he went on, the witness was asked to repeat. "Q. Now, at sometime after that July 18, 1984 meeting did you gain knowledge that Mr. Licate had changed his mind on the Ashtabula being union or versus nonunion? A. Yes, sir. Q. Tell us how that happened. A. It was under a discussion that we had. Q. Where did that discussion take place? A. At Greenleaf Motor Express."

The last question put to Clement by the Company representative was a purely leading one intended to put a date in his mouth. "Q. And that occurred about a month after the July 18, 1984 meeting? A. Yes."

That the date the witness meant as the time Licate changed his mind and no longer wanted to represent the so-called "nonunion" drivers, was 18 August was finally made clear by the General Counsel's question. "Q. Mr. Clement let me pick up with your last statement. Is it your statement that about a month after the 18 July meeting you found out somehow that Mr. Licate had a change of mind regarding including the Ashtabula drivers in the Union? A. Yes, sir."

I do not credit this witness of the Respondent. 18 August was the day Licate took the Respondent's final offer—one which still provided for exclusion of the "nonunion" men from the bargaining unit—to the employees for their consideration. Nothing is clearer on this record than that when Licate told the assembled employees that day the purpose of the meeting, he made it absolutely clear they should reject the offer because he was opposed to such exclusion. How likely is it that he would at the same time tell witness Clement that he was of a completely opposite mind? To put the question is to answer it. Clement was not telling the truth at the hearing.

Wright was also not a credible witness; he was evasive at times, uncertain, and changed his story on occasion. His demeanor as a witness, and the obvious inconsistency between his assertion as to Licate's final position and the other objective facts on the record, compel me to reject his testimony.

For example: He testified that one day he gathered a group of drivers and asked them to sign a document stating they did not wish to become union members. He produced a xeroxed copy of a document bearing a number of signatures. The top was cut off and the sheet of signed names stapled to another sheet of paper with typing on it, detailing what those employees wanted as a condition for joining the Union. The witness explained that he cut off the original piece—which he had written in his own hand, and replaced it with typing so it would be more clearly legible. Asked where was the original, his answer was "I have the originals somewhere." Asked which employees was it he had gathered for that meeting—those who were covered by the expiring union contract or the others, the "nonunion" ones—it was impossible to get a straight answer from the witness. Now he said it was the "union" men, now he said they were the "nonunion" men.

The question of the validity of that document is of no importance at all in this case, for the clearest fact is that there were drivers who preferred not to be union men in order to avoid having deductions taken from their pay for health and welfare benefits and for union dues. But in appraising Wright's credibility as against the General Counsel's witnesses who spoke straight and clearly, this witness suffered very badly.

Wright testified that when he showed that list of names to Licate, the business agent said "he had no choice, there were going in the Union." He was also present at the meeting Licate called when the drivers voted against the Company's proposal after Licate told them he would not agree to excluding the "nonunion"

drivers. In the face of these admissions by his own witnesses, the Respondent's representative obtained the following testimony from Wright:

> Q. Then, the company and Mr. Licate entered into negotiations in 1984 for a new contract at that point in time, and you were party to the negotiations, were you not?
> A. Yes, sir.
>
> Q. During the negotiations, was the subject of Ashtabula Chemical being nonunion brought up?
> A. Yes, it was when we first started.
>
> Q. And was it the Company's position that those people were to be operating nonunion?
> A. Would you rephrase that again?
>
> Q. Okay, I'm sorry. Was the Company's position that Ashtabula Chemical Company was a nonunion operation and was to remain so?
> A. That's what they wanted, yes.
>
> Q. And was that proposed in union contract negotiations with Mr. Licate?
> A. Well, our con—when we finally made our contract, they weren't even mentioned, but we—we went over the Ashtabula Chemical drivers before we got into the contract.

Which is it? What was the witness saying? Did Licate agree to exclude the men when the final contract was reached, or is it that "when we finally made our contract, they weren't even mentioned?" This witness was either fabricating or simply did not know what he was talking about. However I look at it, it serves not at all to support the Respondent's defense.

I adhere to my Decision as issued on 26 December 1985.[1]

Dated, Washington, DC 22 May 1986

/s/ THOMAS A. RICCI
THOMAS A. RICCI
Administrative Law Judge

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER OF THE NATIONAL LABOR RELATIONS BOARD

(April 16, 1986)

Case Nos. 8-CA-17792
8-CA-18146

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

GREENLEAF MOTOR EXPRESS, INC.
ASHTABULA CHEMICAL CORP.,

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL NO. 377, a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA.

ORDER REMANDING PROCEEDING TO ADMINISTRATIVE LAW JUDGE

On 26 December 1985 Administrative Law Judge Thomas A. Ricci issued his Decision in this proceeding. The Respondent filed exceptions and a supporting brief and the General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has determined that as a preliminary matter relevant to the disposition of the case, certain oral testimony which the Administrative Law Judge failed to discuss must be considered by the judge and his credibility resolutions must be considered.

The Respondent presented witnesses Robert Wright and Lester Clement who testified about the Union Business Agent's position during negotiations concerning the inclusion of the Ashtabula Chemical Corp.'s drivers within the existing bargaining unit. The judge discussed testimony relating to this issue as elicited from the Respondent's witnesses, Mark Jarvis, David Jarvis and Jack Jarvis, as well as testimony from the Union's Business Agent, Frank Licate. The judge discredited Jarvis' version but in so doing failed to discuss the corroborative testimony from Wright and Clement. Accordingly, as exceptions have been filed by the Respondent regarding the judge's credibility resolutions, we have decided to remand this proceeding to the Administrative Law Judge for the purpose of his consideration of this additional testimony in resolving the credibility issues raised.

ORDER

IT IS ORDERED that the Administrative Law Judge shall prepare and serve on the parties a Supplemental Decision containing such discussion, findings, resolutions, conclusions, and recommendations as necessary and consistent with this remand. Following service of the Supplemental Decision on the parties the provisions of Section 102.46 of the Board's Rules and Regulations, Series 8, as amended shall be applicable.

Dated, Washington, D.C., 16 April 1986.

DONALD L. DOTSON
Chairman

WILFORD W. JOHANSEN
Member

JAMES M. STEPHENS
Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

DECISION OF THE ADMINISTRATIVE LAW JUDGE

(December 26, 1985)

Case Nos. 8-CA-17792
8-CA-18146

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
DIVISION OF JUDGES

GREENLEAF MOTOR EXPRESS, INC. AND ASHTABULA CHEMICAL CORP.,

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL NO. 377, a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA.

Mark S. Neubecker, Esq., for the General Counsel.

Stuart W. Hyvonem, Esq., and Mr. Ray T. Blankenship, of Greenwood, IN, for the Respondent.

Anthony P. Sgambati, Esq., of Green, Schivoni, Murphy, Haines, & Sgambati, of Youngstown, OH, for the Charging Party.

DECISION

Statement of the Case

THOMAS A. RICCI, A.L.J.: A hearing was held in this proceeding in Ashtabula, Ohio, on 16, 17 and 18 September 1985, on complaint of the General Counsel against Greenleaf Motor Express, Inc., and Ashtabula Chemical Corp., a single employer doing business under two names, here called the Respondent. The Complaint issued on 30 May 1985, upon charges filed on 12 September 1984 and on 20 March 1985, by International Brotherhood of Teamsters, Warehousemen and Helpers of America, Local No. 377, here called the Union or the Charging Party. The issues presented are whether the Respondent violated Section 8(a)(5) of the Act by refusing to bargain with the Union as the statute commands, and whether it violated Section 8(a)(1) of the Act. Briefs were filed by the General Counsel and the Respondent.

Upon the entire record and from my observation of the witnesses, I make the following:

Findings of Fact

I. The Business of the Respondent

Greenleaf Motor Express, Inc., and Ashtabula Chemical Corp., are separate corporations, each engaged in the interstate and intrastate transportation of bulk chemicals; they both operate out of a single location at 4606 State Road, in Ashtabula, Ohio; each of them annually derives gross income in excess of $50,000 for the transportation of commodities from the State of Ohio directly to points outside the State. I find that the Respondent is an employer within the meaning of the Act.

II. The Labor Organization Involved

I find that International Brotherhood of Teamsters, Warehousemen and Helpers of America, Local 377, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

The complaint contains the following allegation of fact, which in its answer the Respondent does not deny:

> 3(A) At all times material herein, Greenleaf Motor Express, Inc., and Ashtabula Chemical Corp., have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have formulated and administered a common labor policy affecting employees of said operations; have shared common premises and facilities; have provided services for and/or made sales to each other; have interchanged personnel with each other; and have held themselves out to the public as a single integrated business enterprise.

Absent any denial by the Respondent, all these factual statements stand as established facts on this record. Time and time again, throughout the extended transcript, officers and management agents of the single company referred to some drivers as Ashtabula employees and others as Greenleaf employees. They also spoke of some of them as union men and others as nonunion men. The fact is it is and has always been one company, and what it did in its treatment of its employees will be therefore here discussed in that light.

For a number of years these employees have been covered by successive collective-bargaining contracts between the Company and Teamster Local 377. The last

contract was effective from 1983 through July 31, 1984. In 1982 the Company started hiring truckdrivers under the separate name it then established—Ashtabula Chemical Corp., to do the same kind of chemical transportation it had always done and was still doing with its old drivers. The new ones were called brokers, because they owned their own trucks which they leased to the Company by the trip. They were paid a certain amount for the use of their truck and a certain amount for the driving which they performed. I think, although the record is not clear on this point, that for what work they performed the new drivers, or so-called brokers, were paid the same amount as were paid the old drivers, called Greenleaf drivers, whether it be by the mile driven or by the hours worked. But in at least two important respects the new men were treated differently by the Company. The contract then in effect required that the Company withhold a certain amount from the earnings of all drivers and pay it to the Union's health and welfare pension fund, to the credit of each man. The Company did not do that with respect to the newly hired drivers. It gave the money to them instead, and they kept it all. Also, the contract required that all drivers become members of the Union within 31 days of their employment. None of the so-called Ashtabula men joined, and the Company did not enforce that part of the contract as to them.

In 1983 the brokerage arrangement ceased and the owner-drivers continued to work as regular drivers, using the company-owned trucks, exactly as the old ones had always done. They shifted back and forth, sometimes two drivers, one from each group, going out on the same single trip together. It was an integrated operation throughout. Before reaching the question of the Company's unilateral action vis a vis its new employees,

and the consequent violations of the statute that that action meant, there is a defense argument that must be considered. Although it argued to the union representatives during the discussions that took place that the named corporations were separate entities, the Respondent surrendered on that point when it formalized its answer to the complaint by expressly not contradicting the single employer allegations. At the hearing it argued that the two groups of employees were nevertheless separate bargaining units and that therefore the contract in effect did not apply to the new, added drivers. On this record it is an unconvincing defense.

All the drivers are under common supervision; all are disciplined by the same supervisors;—Mark Jarvis. They are sent out to work by a single dispatcher, attend the same safety meetings, are subject to the same employment policies, are all paid on the same scale, and all service the same customers of the Company using the same equipment. The fact that on occasion, when a man has driven a truck to a customer said to be that of Ashtabula, a Greenleaf officer first gives the money in payment to an Ashtabula clerk and that clerk then makes a check payable to that driver, is no more than a charade. It is like an employer taking money out of his left hand pocket, putting it into his right hand pocket, and then paying his employee. In the face of the assertion that the employees of the two groups do not have a community of interests, management representatives admitted on the stand that employees from one group are often used to make deliveries for the other and vise-a-versa. See, *Metro Distributors, Inc.*, 27 NLRB 1388. It is a single bargaining unit that was always, and is still today involved in this case.

Another simple way of stating the reality of this case is that a collective-bargaining agreement is not limited in its application only to those employees in the appropriate unit who are at work when the contract is made; it applies as well to other employees hired later who do the same work and are joined, within a single bargaining unit, by the community of interests which underlies the work of all of them.

When an employer who is party to a union contract hires additional people and arranges conditions of employment with them that differ from the terms of the union contract, it ignores Section 8(a)(5) of the statute. This statement of law is so well established a principle as not to require citation of authority. This Respondent started doing just that back in 1982 and clearly violated the statute from then on. The original charge in this proceeding was filed by the Union in September 1984. Based on this last fact the Respondent makes another defense argument. It says that since nobody complained about its unilateral dealings with employees in the bargaining at the start, it is too late to file charges about it now. Restated: Because the employees knew about those drivers, called "Ashtabula men" and "nonunion," for so long a period, it must held that the Union consented to whatever the Respondent was doing, regardless of whether or not it was violating the statute. Again, the position misconceives Board law.

To begin with, the Union—and in this case the Union was represented by Frank Licate, business agent of Local 377—did not know of how the Respondent was ignoring its contract obligations until quite later. But even if the Union officers are aware of flagrant violations of the statute by an employer it does not mean that that employer becomes licensed to continue its illegal conduct, and never mind the filing of proper charges with the

Board. Section 10(b) of the statute does establish a cutoff period—6 months before the filing of charges, and no formal findings of unfair labor practices may be made on whatever happened before that date. In this case it means that if any of the "nonunion" drivers lost any benefits they were entitled to under the then contract in effect before March of 1984 (6 months before the initial charge was filed by the Union), no remedy may be enforced for such losses and no findings may be made as to those earlier events. But if those drivers were prejudiced in any respect after that cutoff date, a remedial order is now proper and findings of unfair labor practices are fully authorized under the statute.

As it happens, the Union, as such, had no knowledge of this device used by the Respondent to hire nonunion men. It is a small company; on its so-called "separate" Greenleaf payroll it had, and has, about six or eight truckdrivers. Licate, the business agent who was involved throughout the events, and who was in charge of this small company on behalf of the Union, is responsible for about 200 contracts covering as many companies throughout his district. He therefore had little occasion, or time, to watch over the conduct of this particular corporation. Moreover, for sometime the drivers hired under the "Ashtabula" name as "nonunion" men, were used almost entirely to work at a place called Moundsville, about 150 miles away from Ashtabula, the home office of the Respondent. Moundsville is not within the geographic jurisdiction of Local 377, Licate's territory. It follows he was not likely to know at all what was going on so far away. It was only when he learned about it all, that he told the Respondent, in writing, that those drivers too were to be treated as the contract in effect provided.

What the Respondent really relies on to support its assertion that the Union knew, and approved of what it was doing, is the fact that its local, or "Greenleaf" union men, did know about it and did not care. When the drivers go to Moundsville they at times must spend the entire week there at a motel to make the necessary deliveries in that area. The employees living in Ashtabula did not like to do that, and so the Respondent hired new men because it needed more of them anyway. The fact that the new men preferred to keep all the money they earned, instead of having the Company send part of it to the Union's H and W and pension fund, and to the Union as union dues, meant nothing to the old drivers who were union members. Even Robert Wright, who was for a time the Local 377 steward, knew of this practice by the Company and did nothing about it. But it does not follow from this that Local 377 can be held to have approved of the Respondent's direct disregard of its contractual obligation. Nor does it support the assertion now by the Respondent that the Union agreed that two separate bargaining units came into existence—one "union," and one "nonunion."

A 3-year contract between the parties expired on _____ 1982. It was then extended for a one year period in 1983. An "addendum" to the Teamster Master Freight Agreement was then signed by these parties for the period 5 August 1983 to 31 July 1984. Licate's testimony, which I credit, is that in about September 1983 he learned that what he always knew as the Greenleaf Company was operating out of Moundsville with nonunion drivers. As that location was outside his jurisdiction he did nothing about it then. Later, in May 1984, he learned that the Company was mixing up its drivers—using both those located in Ashtabula who had always been covered by the Teamster contract and its

Moundsville men to work together, often two men—one union and one nonunion, on the same run. Now it became clear to him that all unit work was being performed by an integrated group. By this time the parties were in communication about negotiating a renewal of the addendum contract about to expire on 31 July.

On 16 April 1984, the Union formally notified the Company of its intent to terminate the existing contract and requesting a meeting. The Company responded on 31 May, and agreed to meet and negotiate. On 5 June the Union wrote a written proposal of new terms to the Company; that letter included the following paragraph:

> Greenleaf Motor Express and Ashtabula Chemical must honor the recognition clause in the National Master Freight Agreement by informing all Ashtabula Chemical employees to become members of Teamsters Local Union 377 after thirty one (31) days of employment.

By this time Licate knew exactly what the Company was doing—ignoring the contract with respect to its so-called "Ashtabula" drivers. Therefore, on 6 June 1984, he also filed a formal grievance reading as follows:

> As business agent for Teamsters Local No. 377, I am filing this grievance against Greenleaf Motor Express and Ashtabula Chemical Company for their failure to cooperate and comply with the recognition clause of the existing collective bargaining agreement as outlined in National Master Freight, Article III(E) Sec. 1-2-3. Greenleaf Motor Express is operated as Ashtabula Chemical, a nonunion company, even though drivers are performing the same type of work, dispatched on the same trips as Greenleaf, along with driving company equipment owned by Greenleaf. Due to the direct violation of the Road Agreement by the Company's failure to inform new employees of their obligation to join

> Teamsters Local Union 377 after 31 days of employment, Local 377 is left with no alternative but to enforce the Agency Shop Clause of the Road Agreement which Greenleaf is signatory through an Addendum dated August 1, 1983 to July 31, 1984. Based on the violations set forth herein, Local 377 hereby requests that Greenleaf Motor Express and Ashtabula Chemical Company immediately inform all drivers who are not in the Union on the date the grievance is filed to become members of Local Union 377.

That grievance was never processed in accordance with the provisions of the contract still then in effect. Instead, the parties met a number of times in an effort to reach agreement on contract renewal. In the discussion the question of the "nonunion" drivers being covered by the contract was discussed a number of times. Every proposal offered by the Respondent was in terms of the "Greenleaf" drivers, always careful to exclude by implication at least those said to be on the Ashtabula payroll. That it was the position of the Company that those drivers must be excluded from the bargaining unit is clearest fact on this somewhat confused record. It is at this point that the first unfair labor practice finding must be made. Inclusion or exclusion of certain employees from the bargaining unit is not a proper subject of collective bargaining. During those discussions—certainly before 31 July 1984, when the contract covering the appropriate unit was in effect—the Company was continuing to ignore the Union's grievance and treating its "Ashtabula" drivers differently than what the contract called for. In so doing it was clearly violating Section 8(a)(5) of the Act, and I so find.

It is also the position of the Respondent now that by the time the talking ended the Union had agreed to exclusion of the "nonunion" drivers from coverage of the contract. In its brief the Respondent contends that because the question about inclusion of the "non-union" drivers was discussed during the negotiations, it follows that matter became a proper subject of collective bargaining. It did not. Licate did talk about that possibility with the Company representatives; he had no choice, with the Company holding firm to its insistence upon their exclusion. Moreover, there is also evidence that many of the drivers kept vascillating on whether or not all the drivers should be members of the Union. At times the "Ashtabula" men thought "yes"; at times they thought "no." In the end, the Company placed in the Union's hands a comprehensive contract proposal. Again, the unit was described as limited to "Greenleaf" drivers only. In the resultant uncertainty the Union called a meeting of its members and asked them whether they wished to ratify that proposal. Licate spoke to them and took the position it was wrong and should be rejected. All the employees present voted against ratification. This was on 18 August 1984. On 20 August Licate advised the company of the vote of rejection.

On 12 September the Union filed this charge with the Board, alleging violations of Section 8(a)(5). In February 1985 the contract put its last offer in effect, the one rejected by the Union.

The Respondent's essential defense to this final and unquestionable unilateral change in conditions of employment is that Licate agreed to exclusion of the "Ashtabula" drivers from coverage of the contract, and that ratification was not necessary, because Licate had given the Company to so understand. Neither defense

stands up on this record. During the 5 or 6 years preceding the 1984 negotiations, every contract agreed to between these parties was ratified by the employees before it became effective, both agreements to be bound by the Teamsters National Contract and the various addendums between these parties. The written correspondence of those events, received in evidence, shows clearly the Company always knew ratification by the employees was a requisite under the Teamster rules. There is nothing persuasive to prove the Union intended in this instance to depart from its established practice.

And it is not true Licate ever agreed to the contract proposal submitted by the Company and rejected by the employees. As stated above, the fundamental disagreement which split the employees, and which the Respondent deemed important enough to insist upon throughout, was whether all drivers should be subjected to contractual requirements that the Company withhold part of their earnings and forward it to the Union in part for benefits in the health and welfare and pension fund of the Union and in part as union dues. Licate's testimony is he never yielded on either of those two questions, and correspondence and proposals of all kinds support his testimony. I must believe him, if only because of the explicit grievance he filed towards the very end on that very subject.

Mark Jarvis, David Jarvis and Jack Jarvis, all officers and operational managers of both named corporations, were present at many of the discussions with Licate. Their testimony, intended to prove the Union officer in the end agreed to exclude the "Ashtabula" drivers from the bargaining unit, is not convincing and I do not credit their combined assertion. Mark Jarvis, while admitting Licate a number of times

insisted all the drivers had to be union members and covered by the contract, also said that at the end of July Licate said: "Let's keep everything the way it is. Let's—ACC will remain non-union, GMX will remain union." But the witness also then added that when the Company negotiators asked Licate "Would you put that into a side agreement?," the Union business agent responded "he would acknowledge it, and he would accept it, but he would not put into writing." This is double-talk testimony I cannot accept.

David Jarvis' testimony also goes both ways and is no more convincing. He said that at a 18 July meeting Licate was told by management "none of the Ashtabula Chemical men wanted in the Union," and that Licate's answer was "that would be impossible, all would have to be in to the Union." In the next breath this witness then added Licate also said: "To hell with them, let them do what they want, stay out of it." David Jarvis closed his testimony with the statement "like I said, Frank Licate said they had to be in union."

Jack Jarvis' testimony also shifted back and forth. At one point he quoted Licate as saying: "Just leave well enough alone, the hell with them, some day they're going to want in, that's it.... He didn't want them." At another point in his testimony this witness also admitted he did receive, from Licate, "a demand, that you put the ACC drivers in the union ...." This witness' testimony must also be appraised in the light of his own predelictions of the moment, to say nothing of the simultaneous violations of Section 8(a)(1) of the statute that were being committed by the Respondent. From his later testimony: "I said that 'I have no objections to anybody joining the Union. They can all join the Union. But I cannot have it that the man at the bottom of the

seniority, nonunion, go down and join the Union, which puts him ahead of the seniority, ...' " It must also be noted that despite the fact the Company operates a single integrated operation, it always uses and always used its employees interchangeably, it maintained a separate seniority list—one for "union" and one for "nonunion" men!

Considering all the testimony, I find that the Union never agreed with the Company to dismember the bargaining unit and to exclude from it those employees who were not at that time members of the Union, called the Ashtabula drivers by the Respondent. It follows that continuing throughout the period of the bargaining, up to the end of August when the last contract between the parties expired, and going on thereafter, right up through the time of the hearing held in this proceeding, the Respondent violated Section 8(a)(5) of the Act by not enforcing the same conditions of employment upon its nonunion men that the contract called for.

Violations of Section 8(a)(1)

In many Board cases involving allegations of refusal to bargain properly with a union, there are also found independent violations of Section 8(a)(1) of the Act, some form of coercion or other practices upon employees individually. In most instances the two violations—of Section 8(a)(5) and Section 8(a)(1)—stand apart, are not necessarily interrelated. Here, there is a very definite relationship between the coercive conduct with respect to the employees themselves—violations of Section 8(a)(1)—and the unlawful conduct vis a vis the Union. In fact, the Respondent's unlawful doings with the employees directly strengthened the finding that the simultaneous bargaining with the Union was not correctly being carried on.

(1) There is confused testimony about a number of meetings management held with its employees. Customarily, about once a month, it holds what are call "safety meetings," to discuss problems of day-to-day truckdriving operations. During these events, the supervisors took these opportunities to discuss matters pertaining to the Union also at such meetings. Whatever, the first violation of Section 8(a)(1) is shown clearly on the record in the direct testimony of Richard Higley, who said he was the chief negotiator for the Company at all the bargaining sessions. He said that upon receiving the Union's proposal letter dated 5 June 1984—the one which included the specific demand that all "Ashtabula" drivers must become union members—he decided to check with the employees to ascertain whether they did or did not care to join the Union. He said he was provoked into doing that because the Union's demand came as a surprise to him. If this record show nothing more than this beginning testimony by Higley, a direct violation of the statute—unlawful questioning of employees concerning their union sentiments—is proved. See, *Strucknes Construction Co., Inc.,* 165 NLRB 1062. It was not a test of a union's claim to majority representation status. The Union was and is in fact the established bargaining agent, with a contract and all. There was no assurance to the employees that there would be no reprisals in consequence of their votes; one came in late to the meeting when the balloting took place, and Higley accepted his written ballot and therefore certainly knew how he voted. But a more solid basis for the unfair labor practice finding is that Higley's real object then was to resolve a dispute he was having with the Union, behind its back, as it were, directly with the employees, and never mind the statutory requirement that the established union is the exclusive representative of all the employees in the appropriate unit!

As it developed, it began to appear that in his testimony later Higley was mixed up. It seems the polling of which he spoke took place in August, on the 25th, after he learned that the employees voted to reject his last offer to the Union. What he did that day, acccording to some documents received in evidence, was to gather the "Greenleaf" or "union" employees first, and then, separately, the "Ashtabula" or "nonunion" employees. He asked the first group to say whether they wished to have the other drivers join the Union, and the other group whether they wished to become union members. The uncontradicted testimony of Bobby Blaire, a so-called "nonunion" driver, about what was said before the balloting, is as follows:

> Well, we were talking about what it would cost us to get into the Union, how much union dues, retirement and everything was going to cost us right off the top. . . . What . . . he [Higley] was explaining that some of us—he said it would be—I think it was around $80 that it would cost us . . . . I guess that was per month . . . . And that came out first and so some of us—the lower guys didn't even make that, so sometimes we wouldn't even make enough you know, to get into—pay your union dues.

If I look at the Respondent's questioning of its employees in this light, it was still improper interrogation concerning union sentiments, and a deliberate bypassing of the Union and direct dealing with the employees. I find that by so polling its employees in the face of the Union's continuous, proper insistence that all employees in the bargaining unit must be subject to any resultant collective-bargaining agreement, the Respondent violated Section 8(a)(1) of the Act. Unable to convince the Union that the bargaining unit should be dismembered, Higley turned to the employees themselves to persuade them, with very pertinent

comment on the cost of union membership, to put pressure on the Union to agree with his view of a proper collective-bargaining contract!

(2) Weldy, then a "nonunion" man being paid by Ashtabula check, testified that one day in June Higley called him to the office and asked what the "biggest complaint was of the nonunion drivers." When Weldy said it involved the motel where the men had to spend time in Moundsville, a place they did not like, Weldy also said then "... we need something to protect us ... because at times, Mark flew off the handle, Mark Jarvis. And we have to have some sort of protection ...." With this, still according to Weldy's testimony, "... he [Higley] told me, yes, he knew sometimes Mark got carried away and that if we didn't have a union, if the Union was to go out, they would have to set up some sort of a committee with drivers and everybody represented so that we'd have some sort of protection ... Q. Did he tell you who would be on this committee? A. It would—he said the drivers would be represented by other drivers."

The witness then recalled that a month later, on 7 July, there was a regular once a month safety meeting with all drivers present and all the Jarvises as supervisors also present. After the safety subjects had been discussed, Jack Davis asked Wright, then still the union steward, to speak to the drivers. Wright then announced that the Company had agreed to provide a more desirable motel at Moundsville, and also to give certain added concessions the Union had demanded. Wright also explained to all the men that the nonunion men were to remain nonunion. At that point Weldy spoke up and protested the favored treatment that was given the union men on the two separate seniority lists.

During the meeting Higley, who was also present, used a blackboard "... to demonstrate the advantages of nonunion and being union, and what it would cost as far as your benefits go, what the Union charges and for what he could—they could get benefits for you." Higley also told the men then "... you really didn't need a union because they would set up a committee that ... with drivers represented on it so that we would have the same—more or less the same procedure as the union would have, without the Union."

According to Jack Jarvis, who testified later, it was Weldy who suggested a committee to handle the complaints of the drivers and that his first response was "That sounds logical, I would consider that." This witness continued that his next comments were "... it seemed to be the fair way of doing this would be two senior, two junior drivers, and company representation, so it would be fair that seniority would not overrule or anything would be equal and fair." Asked to explain the purpose of the projected committee, Jarvis then said: "To represent the nonunion employees in case they had complaints."

Higley contradicted Weldy's starting testimony about a committee; he said instead that it was Weldy who came to him and first suggested such a committee, and that he agreed it was the correct thing to do. Higley did recall that that conversation came after Licate had written his 5 June demand that all Ashtabula drivers had to join the Union. This is a critical statement by the manager because regardless of who first mentioned a committee such as this, it was still an unfair labor practice for the Respondent's agent to agree to such an arrangement. What it really meant, and surely it was what Higley desired throughout, was dealing with the employees entirely apart from the Union which had a statutory right to be exclusive representative!

No action was taken to formally organize any committee. But, in the light of the total record, I credit Weldy against Jarvis and Higley, and I find that by suggesting the formation of a committee to deal directly with the employees, apart from their union representative, the Respondent violated Section 8(a)(1) of the Act, as alleged in the complaint. *Atlas Microfilming Division of Serta Film, Inc.*, 267 NLRB 362.

* * * * *

Licate testified, without contradiction, that after informing the Respondent that the Company's last contract proposal had been rejected, he requested Higley to meet with him and bargain about the conditions of employment applicable to the "Ashtabula" drivers and that Higley refused to do so. The parties never met again in negotiations. I find, in conclusion, that the Respondent literally refused to bargain with the Union with respect to all employees in the appropriate unit and thereby violated Section 8(a)(5) of the Act. In remedy it must be ordered to do so now.

The Respondent continued to apply the terms of the contract which had expired on 31 July 1984, only, of course with respect to the employees it called "Greenleaf" employees, no matter which of the two named corporations they worked for. In November the Teamsters Local 377 Health and Welfare Fund informed the Respondent, in writing, that it had been advised by Licate that the premiums rates for its employees had been raised as of 1 September 1984, from $44.50 to $55, and that therefore additional money should be sent to the fund. There were several such requests and the Respondent then sent the additional health and welfare payments to the fund. But, in keeping with its firm resolve, it paid only for its so-called Greenleaf drivers,

and not for any of the rest. In February 1985 the Respondent put into effect all the terms and conditions of the contract which it had offered the Union but which had been rejected in August 1984.

I find no merit in the argument made now that Licate's action in seeking to obtain increased payments for the Union's health and welfare fund either proves (1) that he had agreed to be bound by the contract which had been rejected in August, or (2) that he accepted that offer on 1 September 1984, the day from which the added payments were requested. Licate never wavered in his determination to force the Company to recognize Local 377 as bargaining agent for the "Ashtabula" drivers. On that subject the record could not be clearer. By the time the November demand for more money was received by the Respondent, he had already filed his charge with the Board—proof positive that he did not believe the issue was settled to the Respondent's satisfaction. No contract was ever signed; indeed the parties never even met again in negotiations after 1 August for the very reason that the Company refused to discuss the most proper subject of bargaining—employment conditions for all employees in the bargaining unit. Unfair labor practices—especially as so clearly shown here on this record—are not disposed of unilateral, ambiguous action of a charging party. After the charge has been filed the sole responsibility for disposition of the case rests with the General Counsel. All Licate was trying to do, by the device of a claim from the Union's fund was, to squeeze more money from the Respondent so as to least benefit some of the employees the Union represented. To hold his single act—no contract was ever signed!—as sufficient basis to deny all employees in the correct bargaining unit the rights guaranteed by this statute would make a mockery of the law.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate and substantial relation to trade, traffic, and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

Conclusions of Law

1. The Respondent, Greenleaf Motor Express, Inc., and Ashtabula Chemical Corp., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Teamsters, Warehousemen and Helpers of America, Local 377, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(a) of the Act:

> All over-the-road truckdrivers employed by the Respondent—both Greenleaf Motor Express, Inc. and Ashtabula Chemical Corporation—, excluding all supervisors as defined in the Act.

4. The Union is now and has been at all times material herein the exclusive representative of all employees in the above-described unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing to bargain with the Union as the exclusive bargaining representative of all the employees in the appropriate bargaining unit the Respondent has violated, and is violating Section 8(a)(5) of the Act.

6. By polling its employees as to whether they wish to become members of the Union the Respondent violated Section 8(a)(1) of the Act.

7. By polling its employees to inquire whether they agreed with the proper demands of their union representative in the collective-bargaining process, the Respondent violated Section 8(a)(1) of the Act.

8. By promising its employees it would create an employee-employer committee to resolve complaint absent their statutory bargaining agent, the Respondent violated Section 8(a)(1) of the Act.

9. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

The essential remedial action is that the Respondent must recognize Local 377 as exclusive representative of all its employees—whether on the payroll of Greenleaf or Ashtabula, and bargain with it in good faith on behalf of all its employees. It must also cease and desist from interrogating employees as to their union sentiments, suggesting the formation of any committee to handle employee complaints apart from their union representative, or polling employees to ascertain whether they wish to become union members or whether they agree with the demands of their union representative voiced in the course of regular collective bargaining.

As it was an unfair labor practice for the Respondent to have failed to deduct health and welfare and pension payments from the earnings of some of its employees and forwarding that money to the Local 377 fund, the Company must be ordered to do that now. This correct practice of treating all employees in the appropriate unit alike must continue until such time as, after proper bargaining with the Union, some other terms and conditions of employment may be agreed upon.

The record does not show whether, in its disparate treatment of the drivers, the Respondent denied to any of the "Ashtabula" employees any monetary benefits enjoyed by the other group under the terms of the collective-bargaining agreement in effect. That matter will be left to the compliance investigation stage of this proceeding. If it develops that some of the employees were denied monetary benefits coming to them under the contract in effect, the Respondent will be responsible to compensate them accordingly.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record, I hereby issue the following recommended:

ORDER[1]

The Respondent—called Greenleaf Motor Express, Inc., and Ashtabula Chemical Corp.,—its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain with International Brotherhood of Teamsters, Warehousemen and Helpers of America, Local 377, as the exclusive bargaining

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections thereto shall be deemed waived for all purposes.

representative of all the employees in the appropriate bargaining unit, concerning wages, hours, and conditions of employment.

(b) Polling its employees as to whether they wish to become members of the Union.

(c) Polling its employees to inquire whether they agree with the proper demands of their exclusive bargaining agent in the collective-bargaining process.

(d) Promising its employees to form an employee-employer committee to resolve employee complaints apart from the statutory bargaining agent, in this case the Union.

(e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Upon request of the Union, bargain collectively with the Union in good faith regarding rates of pay, hours of employment and other terms and conditions of employment for all employees in the appropriate unit, and if an agreement is reached, reduce the agreement in writing and sign it.

(b) Make whole any of its employees in the appropriate bargaining unit for any monetary benefits they may have been denied for being classified "Ashtabula" employees during the period 12 March 1984 to the time the Respondent may alter the conditions of employment following proper bargaining with the Union.

(c) Post at its place of business in Ashtabula, Ohio, copies of the notice attached hereto and marked "Appendix."[2] Copies of said notice, on forms provided by the Regional Director for Region 8, after being duly signed by its representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 8, in writing, within 20 days from the date of receipt of this Decision, what steps the Respondent has taken to comply herewith.

Dated, Washington, D.C. 26 December 1985

/s/ THOMAS A. RICCI
THOMAS A. RICCI
Administrative Law Judge

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[2] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board having found, after a hearing, that we violated the law by refusing to bargain in good faith with INTERNATIONAL BROTHERHOOD OF TEAMSTERS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL NO. 377, a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

WE WILL NOT refuse to bargain with that Union on request.

WE WILL NOT poll our employees to inquire as to whether they wish to become or remain members of the Union.

WE WILL NOT poll our employees to inquire whether they agree with the proper demands of their exclusive bargaining agent in the collective-bargaining process.

WE WILL NOT promise our employees that we will form an employee-employer committee to resolve complaints apart from their statutory bargaining agent, in this case, the Union.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act.

WE WILL, upon request, recognize and bargain collectively in good faith concerning rates of pay, wages, hours, and other terms and conditions of employment with INTERNATIONAL

BROTHERHOOD OF TEAMSTERS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL NO. 377, a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, as the exclusive bargaining representatives of the employees in the appropriate unit, and if an understanding is reached, embody such understanding in a signed agreement. The appropriate bargaining unit is:

All over-the-road truckdrivers emplcyed by the Respondent—both Greenleaf Motor Express, Inc., and Ashtabula Chemical Corporation—, excluding all supervisors as defined in the Act.

GREENLEAF MOTOR EXPRESS, INC. AND ASHTABULA CHEMICAL CORP.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Anthony J. Celebrezze Federal Bldg., 1240 E. 9th St., Room 1695 (Tel. No. (216) 522-3733).

Supreme Court, U.S.
FILED
OCT 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-274

(2)

In the Supreme Court of the United States

OCTOBER TERM, 1989

GREENLEAF MOTOR EXPRESS, INC., AND
ASHTABULA CHEMICAL CORPORATION, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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17pp

QUESTION PRESENTED

Whether the record contains substantial evidence supporting the National Labor Relations Board's conclusion that an unfair labor practice charge was filed within the six-month limitations period prescribed by Section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b).

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A15) is unpublished, but the judgment is noted at 872 F.2d 1027 (Table). The decision and order of the National Labor Relations Board (Pet. App. A16-A22), and the decision (Pet. App. A34-A58) and supplemental decision (Pet. App. A25-A30) of the administrative law judge are reported at 285 N.L.R.B. No. 116.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1989. A petition for rehearing and a suggestion for rehearing en banc were denied on May 18, 1989 (Pet.

App. Al-A2). The petition for a writ of certiorari was filed on August 16, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are two Ohio corporations, Greenleaf Motor Express, Inc. (Greenleaf) and Ashtabula Chemical Corp. (Ashtabula), that have engaged in the transportation of bulk chemicals. During the period relevant to this case, Greenleaf and the Union[1] were parties to a collective bargaining agreement that defined the bargaining unit to include all "drivers" or "driver-helpers" operating vehicles for transportation purposes and required each employee within the unit to join the Union within 31 days of initial employment. Pet. App. A4.

In 1979, Greenleaf's officers formed Ashtabula to buy and sell chemicals. In 1982, Ashtabula began to haul loads from Moundsville, Tennessee, using owner-operators or "brokers." These owner-operators leased their trucks by the trip and received separate payments for equipment rental and driving services. Late in October 1983, the brokerage arrangement ended. The Ashtabula drivers were placed on Ashtabula's payroll, but were assigned to Greenleaf to drive Greenleaf trucks. Greenleaf's and Ashtabula's drivers served the same customers, worked under the same supervisors, attended the same safety meetings, observed the same work rules, and sometimes were paired in a single truck. Greenleaf and Ashtabula drivers also received the same compensation, except that amounts deducted from the Greenleaf drivers' wages for health, welfare, and pension benefits were not

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[1] International Brotherhood of Teamsters, Warehousemen and Helpers of America, Local 377, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

deducted from the Ashtabula drivers' wages. None of the Ashtabula drivers joined the Union, and petitioners did not enforce the contractual union membership provision as to them. Pet. App. A5, A18-A19, A36-A37, A40.

In May 1984, Union Business Agent Frank Licate accompanied Greenleaf driver Jerry Ashley to Columbus, Ohio, to attend a hearing on a grievance filed by Ashley. From Ashley's remarks during the trip, Licate learned for the first time that the nonunion Ashtabula drivers were performing bargaining unit work. Pet. App. A5, A19. On June 5, at the outset of negotiations for a contract to replace the agreement due to expire in July, Licate submitted the Union's proposal, which included a provision requiring Greenleaf and Ashtabula to honor the recognition clause in the Master Freight Agreement by informing drivers of their obligation to join the Union.[2] Throughout the subsequent contract negotiations, the Union persisted in its demand that the Ashtabula drivers be recognized as part of the bargaining unit, and petitioners refused to do so. On August 18, the Union drivers voted to reject petitioners' contract proposal because it limited the bargaining unit to drivers receiving all their wages from Greenleaf. Petitioners then refused Licate's request for further bargaining. Pet. App. A5-A6, A42-A44, A52.

On September 12, 1984, the Union filed a charge with the Board; the charge alleged that, on or about May 1, the Union had learned that Greenleaf and Ashtabula were a single employer for purposes of the National Labor Relations Act and had nevertheless refused to apply the collective bargaining agreement to all of the employees within the bargaining unit. Pet. App. A7; C.A. App. 225. A complaint issued alleging that Greenleaf and Ashtabula constituted a

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[2] On the following day, Licate filed a formal grievance alleging that Greenleaf and Ashtabula were violating the recognition provisions of the agreement by refusing to enforce the union membership provisions with respect to Ashtabula drivers. Pet. App. A42-A43.

single employer within the meaning of the NLRA and, since on or about June 6, had refused to recognize and bargain with the Union concerning the wages, hours, and terms and conditions of employment of the drivers employed by Ashtabula, in violation of Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1). Pet. App. A7; C.A. App. 227, 229.

2. Affirming the findings and conclusions of the ALJ with certain modifications, the Board found that Greenleaf and Ashtabula were a single employer for the purposes of the Act, and that all drivers employed by either company were members of a single bargaining unit. The Board affirmed the ALJ's findings that petitioners had violated Section 8(a)(5) of the Act by refusing to bargain with the Union with respect to the Ashtabula drivers and to apply the terms of the collective bargaining agreement to those drivers. See Pet. App. A17-A18 & n.3, A47, A54-A56. The adjudicated violations were limited to the six-month period preceding the filing of the Union's charge (March 12, 1984, to September 12, 1984). The Board did not affirm the ALJ's finding (Pet. App. A39) that petitioner had violated Section 8(a)(5) since 1982, observing that "[s]uch a finding reaches beyond the 10(b) period, is not alleged in the complaint, and is unnecessary to the resolution of the issues in the case" (Pet. App. A17 n.2). Finally, the Board concluded that petitioners had violated Section 8(a)(1) of the Act by dealing with their employees directly, rather than through their exclusive bargaining representative, and by coercively interrogating them concerning their union activities and sympathies. Pet. App. A17, A47-A52.

The Board rejected petitioners' contention that the refusal to bargain charge was time-barred under Section 10(b) of the Act, 29 U.S.C. 160(b).[3] The Board noted that

[3] Section 10(b) provides in pertinent part that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board."

although Greenleaf employees, including the union steward, were aware of Ashtabula's existence during the period that it used owner-operators under brokerage arrangements, a number of factors tended to keep the Union unaware of any failure by petitioners to comply with their statutory obligations (Pet. App. A18):

> [T]he two groups of drivers initially worked in entirely different geographic areas, approximately 150 miles apart, had no regular contact with each other, and were unlikely to have any knowledge or concern about the others' terms and conditions of employment or union status. Moreover, the Ashtabula drivers worked in a different State, outside the jurisdiction of Local Union 377. Further, during 1982 and 1983 Ashtabula functioned as a brokerage operation whereby owner-operators leased their trucks to the company and received separate payments for equipment rental and their driving services.[4]

Even after petitioners modified their operations in late 1983 and began to make "intermittent assignments" of Greenleaf and Ashtabula drivers to the same runs, the Board continued, it was reasonable that none of the unionized Greenleaf employees would have known immediately that petitioners were circumventing their bargaining obligation and creating a parallel nonunion work force to perform bargaining unit work. Pet. App. A18-A19; see *id.* at

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[4] Owner-operators may be "independent contractors," rather than employees covered by the Act. See Section 2(3) of the NLRA, 29 U.S.C. 152(3); *Building Material & Dump Truck Drivers* v. *NLRB*, 669 F.2d 759, 764-765 (D.C. Cir. 1981), aff'd, 459 U.S. 344 (1983).

Since the Board's complaint did not allege a violation of the Act during the period that Ashtabula operated with owner-operators, it was not necessary for the Board to determine whether petitioners had violated the statute during that period or whether the owner-operators would be deemed employees.

A39-A47. The Board credited Union Business Agent Licate's testimony that, while he knew about the brokerage system in 1982 and 1983, he was not then aware that it had any impact on the Greenleaf operation or infringed on bargaining unit work, and it noted that the record was "clear that Licate first learned about [petitioners'] using nonunion drivers alongside unit employees in May 1984." The Board found "no basis for concluding that the Union condoned [petitioners'] activities or in any way waived its representational rights over the Ashtabula drivers." *Id.* at A19.

The Board ordered petitioners to bargain with the Union as the representative of all Greenleaf and Ashtabula drivers. The order also required petitioners to make the drivers on the Ashtabula payroll whole for any loss of monetary benefits they had sustained from petitioners' failure to apply the agreement to them for the period from March 12, 1984 (six months before the filing of the charge), to the time when good faith bargaining relieved them of their statutory obligation to continue the terms of the expired agreement in effect. Finally, the Board directed petitioners to cease and desist from interfering with their employees' Section 7 rights by bypassing the Union, polling and interrogating employees about their union sentiments, promising to establish an employer-employee committee to replace the Union, or engaging in other similar violations of the employees' rights. Pet. App. A20-A21.

3. In the court of appeals, petitioners conceded that their refusal to bargain with the Union as the representative of the Ashtabula drivers was unlawful under Section 8(a)(5) of the Act, but asserted that the Union's charge was untimely under Section 10(b). Pet. App. A8. In an unpublished opinion, the court of appeals rejected that contention and enforced the Board's order. Pet. App. A3-A15.

The court found substantial evidence in the record to support the Board's finding that the Union did not know until

May 1984 that the Ashtabula operation was being conducted in a manner that infringed on bargaining unit work. Pet. App. A12.[5] For several reasons, the court found "unpersuasive" petitioners' argument that they had openly and notoriously violated the collective bargaining agreement in 1982 and thus that the period of limitations had begun to run at that time. First, the court noted that because Ashtabula had used owner-operators prior to late 1983, it was reasonable to assume that the Union did not immediately know that petitioners were circumventing the collective bargaining agreement through the creation of a nonunion employee workforce. *Id.* at A10. Second, the court stated, the Union could reasonably have assumed, even in 1983, that the Ashtabula employee-drivers were owner-operators "without a sufficient shared 'community of interests' to comprise a single appropriate bargaining unit with the Greenleaf drivers." *Id.* at A10-A11. Third, the court noted that when petitioners opposed the Ashley grievance in 1984, they argued that the Ashtabula drivers were not working in violation of the agreement. Thus, the court observed, petitioners did not "openly engage in unlawful conduct, but effectively concealed [their] violations" *Id.* at A11.[6] Finally, the court noted that the Board's determination rested on its decision to credit the testimony of Union officials over testimony of petitioners' officers. The panel concluded that those credibility determinations were reasonable, and that there was "substantial evidence * * * to support the Board's

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[5] The court found reasonable both the Board's credibility determinations and its inferences from the record evidence (Pet. App. A9-A12).

[6] During contract negotiations with the Union in 1984, petitioners asserted that Greenleaf and Ashtabula were separate entities. Though petitioners later abandoned that contention, they continued to argue in proceedings before the ALJ that the Ashtabula and Greenleaf drivers were not members of a single bargaining unit. See Pet. App. A38; C.A. App. 87, 235-236.

finding that the Union did not know of the Company's unfair labor practices until May, 1984." *Id.* at A12.[7]

ARGUMENT

Petitioners seek further review only of the court of appeals' application of Section 10(b) to the facts of this case. However, the court of appeals correctly rejected petitioners' reliance on that statute of limitations, and its unpublished decision does not establish any new legal standard at variance with the decisions of this Court or of other courts of appeals. In any event, since the violations adjudicated by the Board and the relief it awarded were limited to the six-month period prior to the filing of the Union's charge, petitioners would not be entitled to relief from the court of appeals' judgment even if their view of the facts of this case were adopted. Further review is not warranted.

1. As petitioners note (Pet. 14), the courts of appeals have uniformly adopted the view that the six-month period of limitations begins to run when an injured party knows or should know that its statutory rights have been violated. Petitioners contend, however, that the Sixth Circuit has announced a new standard in this case – under which the period of limitations commences only when an employee receives "unequivocal notice" of a violation. Under their view, the court's decision "eliminates any reference to when the charging party should have known of the wrongful acts or any reference to a charging party's obligation to exercise due diligence to determine if its rights have been violated." Pet. 14. That is an unreasonable interpretation of the court of appeals' opinion, for several reasons:

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[7] The court also affirmed the Board's determination that petitioner had violated the Act by bypassing the Union and interrogating employees as to their union sympathies. Pet. App. A12-A15. Petitioner does not seek further review of that holding. Pet. 9.

First, in connection with the court of appeals' reference to "unequivocal notice"—a reference appearing only in a parenthetical in a "see also" citation—we note that the standard definition of "notice" includes both knowledge and "reason to know." See, *e.g.*, Restatement (Second) of Agency § 9 (1958).

Second, there is no indication that the panel intended to depart from the Sixth Circuit's decision in *NLRB* v. *Allied Products Corp.*, 548 F.2d 644, 650 (1977), which, as petitioners concede (Pet. 14-15), is consistent with the decisions on which they rely from other courts of appeals.[8] To the contrary, the panel cited *Allied Products* with approval, and the full court denied a suggestion for rehearing en banc in which petitioners urged that the panel's decision had given rise to an intra-circuit conflict. Moreover, the court of appeals' decision in this case is unpublished—an action reflecting the panel's conclusion that the opinion does not "establish[ ] a new rule of law, or alter[ ] or modif[y] an existing rule of law"—and has limited precedential value. 6th Cir. R. 24(a)(i) and (c). Absent some clear indication that the Sixth Circuit has placed itself in conflict with decisions from other circuits, this Court's review is unwarranted.[9]

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[8] In *Allied Products*, the court said (548 F.2d at 650):

> The Board has consistently held, with the endorsement of at least two circuits, that the six month limitation period does not begin to run until the employer's unlawful activity, which is the basis for the unfair labor practice charge, has become known to the charging party. * * * This is only a specific application of the general rule that a limitation period begins to run "when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged [violation]."

The fact that the Sixth Circuit chose not to quote the second of these sentences in its opinion in the instant case does not signal any change in its interpretation of Section 10(b).

[9] The Sixth Circuit's "see also" reference to its decision in *Armco, Inc.* v. *NLRB*, 832 F.2d 357, 362 (1987), cert. denied, 108 S. Ct.

Finally, the court of appeals' holding was not limited to a determination that the Union had no actual knowledge of any statutory violations that may have occurred prior to May 1984. In its analysis of the facts of the case, the court upheld the Board's determination that a variety of circumstances tended to keep the Union unaware of any violation that may have occurred during the period that Ashtabula was using owner-operators. Moreover, the court stated that even after those owner-operator arrangements had been terminated, the Union "could reasonably have assumed" that Ashtabula drivers were not members of the bargaining unit that the Union represented. Pet. App. A10-A11. In a footnote rejecting petitioners' laches and estoppel defenses, the court made the same point. It concluded that "[n]o proof has been offered to show that the Union knew *or had reason to know*, prior to May, 1984, that the Company had changed the status of the non-union Ashtabula drivers and had failed to require them to join the Union, thus violating the collective bargaining agree-

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2034 (1988), is not such an indication. *Armco*, which approved the rule established by the Board in *United Postal Service Marina Mail Processing Center*, 271 N.L.R.B. 397, 400 (1984), deals with a different situation. *United Postal Service* held that the limitation period begins to run when a charging party is unequivocally informed that an adverse action will be taken, and not at the later date when the action becomes effective. In effect, it prescribes when a violation is deemed to have occurred for purposes of the statute. That case does not deal with the question raised by petitioners here—whether a charging party should reasonably have been aware of a violation that has already occurred. Thus, the Sixth Circuit's qualified citation to that principle was entirely appropriate.

NLRB v. *IBEW, Local 112*, 827 F.2d 530, 533 (9th Cir. 1987), like *United Postal Service*, was a case in which the issue was whether the employer had actually committed itself to actions constituting an unfair labor practice. There is no conflict between that decision and decisions of other courts of appeals. See Pet. 15.

ment." *Id.* at A12 n.1 (emphasis added). Petitioners were not deprived of a determination on the question whether the Union should have known of their statutory violations; the Board and the court of appeals determined that it was reasonable for the Union not to have acquired that knowledge earlier than it did.[10]

In short, petitioners' assertion that the court of appeals' opinion announces a new standard at variance with decisions applying Section 10(b) and other statutes of limitations—the essential predicate for their contention that this case warrants this Court's review—is unfounded.

2. Petitioners also urge the Court to consider which party bears the burden of proof with respect to certain issues arising under the statute of limitations. Pet. 21-27. They argue that the court of appeals erred by failing to require the Board's General Counsel to bear the burden of proving "those facts or elements necessary to justify equitable tolling." See Pet. 22-23. Here again, petitioners' request for further review rests on a misinterpretation of the court of appeals' opinion.

The court's only reference to the placement of the burden of proof was its general observation that "because Section 10(b) is an ordinary statute of limitations, it is an affirmative defense that must be proved by the party alleging it." Pet. App. A9. There can be no dispute as to the accuracy of that principle, and petitioners do not suggest otherwise. The court did not address at all the narrower proposition on which petitioners rely—the contention that when a defendant makes out a prima facie case that a claim has

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[10] To be sure, petitioners argue that the Board's findings, which were affirmed by the court of appeals, were not supported by substantial evidence. Pet. 12. That factbound claim, however, is plainly undeserving of this Court's attention. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

accrued for purposes of a statute of limitations, the plaintiff should bear the burden of proving facts necessary to toll the statute.

That issue was not before the court of appeals on the facts of this case. Neither the ALJ nor the Board relied upon the burden of proof in deciding the case. Rather, they based their decisions upon testimony as to the manner in which the Union learned of petitioners' violations of the statute and evidence that bore on the reasonableness of its not having acquired that knowledge at an earlier point. Since there was ample evidence bearing on the statute of limitations issue, and since the Board found that the evidence supported the Union's position, it was immaterial which party bore the burden of proof. In reviewing the Board's decision, therefore, the court of appeals had no occasion to consider which party might have the burden of going forward, or the burden of persuasion, with respect to equitable tolling, fraudulent concealment, or the other doctrines referred to in the petition.

Indeed, the Board's complaint sought only an adjudication that petitioners had violated Section 8(a)(5) of the Act during the six-month period preceding the Union's unfair labor practice charge (see Pet. App. A17 n.2), and the Board's relief was limited to that period. The Board's claim thus entailed no "tolling" of the statute of limitations as such—*i.e.*, no determination whether fraudulent concealment or other circumstances made it appropriate to consider violations that would otherwise fall outside of the period of limitations.

3. Even if it could be shown that the court of appeals misapplied the statute of limitations, there would remain an alternative basis for affirming its judgment. As noted above, the General Counsel's complaint sought only an adjudication that petitioners violated the Act by failing to bargain with the Union as the representative of the Ashtabula drivers during the six months preceding the

Union's charge. The ALJ stated that even if a union is aware of violations by an employer that have taken place outside the limitations period, that "does not mean that that employer becomes licensed to continue its illegal conduct." Pet. App. A39. At least two members of the Board panel affirmed that alternative basis for finding petitioners' violations actionable,[11] and the Board expressly noted that its adjudication of petitioners' violations of Section 8(a)(5), like the relief awarded for those violations, was limited to the six-month period preceding the Union's charge (Pet. App. A17 n.2). Although the court of appeals did not rely on these limitations in the Board's decision, they provide an adequate alternative basis for affirming its order.

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[11] With respect to the third member of the Board panel, the Board's opinion noted (Pet. App. A19 n.5):

> Because the Union's knowledge of this practice and [petitioners'] refusal to bargain on demand occurred within the 10(b) period, Chairman Dotson finds it unnecessary to pass on the judge's alternative analysis concerning continuing violations of the Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JOSEPH E. DESIO
Acting General Counsel

D. RANDALL FRYE
Associate General Counsel

ROBERT E. ALLEN
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National Labor Relations Board

OCTOBER 1989

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—262-203/00558